No. 87-5546-CFH
Status: GRANTED

Title: Donald Gene Franklin, Petitioner
v.
James A. Lynaugh, Director, Texas Department of Corrections

Docketed:
September 25, 1987

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Stevens,Mark

Counsel for respondent: Zapalac,William C.

Entry	Date	Note	Proceedings and Orders
1	Sep 25 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 25 1987		Application for stay of execution filed (A-251), and referred to the Court by White, J., on September 25, 1987.
5	Sep 29 1987	X	Brief of respondent James A. Lynaugh, Director in opposition to request for stay of execution and petition for certiorari filed.
4	Sep 30 1987		Above application for stay of execution GRANTED by order of Court.
6	Sep 30 1987		DISTRIBUTED. October 16, 1987
8	Oct 9 1987		Petition GRANTED. limited to Question 3 presented by the petition.
			**********
10	Nov 21 1987		Order extending time to file brief of petitioner on the merits until December 10, 1987.
11	Dec 2 1987		Joint appendix filed.
12	Dec 9 1987		Brief of petitioner Donald G. Franklin filed.
13	Dec 22 1987		Record filed.
		*	Certified original record, 10 volumes, received.
15	Jan 4 1988		Order extending time to file brief of respondent on the merits until January 15, 1988.
16	Jan 5 1988		SET FOR ARGUMENT. Tuesday, March 1, 1988. (3rd Case). (1 hour).
17	Jan 11 1988		Order further extending time to file brief of respondent on the merits until January 22, 1988.
18	Jan 20 1988		CIRCULATED.
19	Jan 22 1988	X	Brief of respondent James A. Lynaugh, Director filed.
20	Feb 22 1988	X	Reply brief of petitioner Donald G. Franklin filed.
21	Mar 1 1988		ARGUED.

87-5546

No. ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DONALD GENE FRANKLIN,

Petitioner

v.

JAMES A. LYNAUGH,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 823 F.2d 98 (5th Cir. 1987). A copy of the opinion is attached as Appendix A.

The memorandum decision of the United States District Court for the Western District of Texas has not been reported. It is attached as Appendix B.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 2254 and 28 U.S.C. § 1331, petitioner filed a petition for writ of habeas corpus by a person in state custody in the Western District of

Texas, after exhausting his remedies in the state courts. On April 11, 1986, the district court stayed petitioner's sentence of death. On July 9, 1986, following an evidentiary hearing, the court denied the petition for writ of habeas corpus and vacated the stay of execution. The court also denied petitioner's application for certificate of probable cause to authorize appeal, but granted his application to proceed in forma pauperis.

On appeal to the Fifth Circuit Court of Appeals, petitioner filed an application for stay of execution, and an application for certificate of probable cause to authorize appeal and for leave to proceed on appeal in forma pauperis. On September 12, 1986, these applications were granted by the Fifth Circuit. On July 30, 1987, the judgment of the district court was affirmed and the stay of execution was vacated. No petition for rehearing was sought.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth, Fifth, Sixth, Eighth and Fourteen Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted of capital murder and assessed the death penalty pursuant to TEX. PENAL CODE ANN. § 19.03(a)(2). In this petition he lists and discusses seven separate reasons for granting this writ. For the sake of clarity, the facts in this statement of the case will be set out separately, corresponding with each separate reason for granting the writ.

I.

(Impermissible Comment on Post Arrest Silence, in Violation of Doyle v. Ohio)

At trial the state asked its police officer witness whether he had "a conversation" with petitioner at the homicide office, following the arrest and the administration of the Miranda warnings. This detective, a veteran of 24 years as a police officer, testified: "I talked to him but he refused to talk to me." [R.X--2279][1] Petitioner's proper objection was sustained, and the jury was instructed to disregard. His motion for mistrial, however, was overruled. [R.X--2279-2280]

The Court of Appeals below found this to be "the most nearly meritorious" of petitioner's grounds of error. Nevertheless, the court ruled against petitioner, holding that no use of petitioner's silence had been permitted by the trial court, and thus, under this Court's decision in Greer v. Miller, ____U.S. ____, 107 S.Ct. 3102, 95 L.Ed.2d_____ (1987), no error was shown. Franklin v. Lynaugh, 823 F.2d 98, 99 (5th Cir. 1987).

II.

(Illegal Search and Seizure)

Sometime after 2:00 a.m. on July 26, 1975 petitioner became a suspect in the abduction of Mary Margaret Moran. [R.II--86,218] A large group of police officers held a meeting in the vicinity of petitioner's home because they "didn't know what [they] were going to do about the situation." [R.II--218] A "conscious

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1. References are to the volume and page number of the transcribed record of petitioner's trial, unless otherwise noted.

decision" was made at this time not to seek either an arrest or search warrant. [R.II--159-160] Instead the police agreed to "try to use a consent to search," and the appropriate forms were filled out. [R.II--219] This meeting was held at approximately 5:00 a.m., some three hours after petitioner's identity was known. [R.II--148]

The police established a quadrant around petitioner's house, covering all possible doorways and exits to prevent escape. [R.II--189--190] Several armed police officers went to the back door, and called out for petitioner, who eventually came to the door. [R.II--189] Petitioner was not free to go from the moment he came to the door. [R.II--170] He was advised he was a suspect and given his Miranda warnings immediately. [R.II--153]

The visit was at 5:00 a.m. and it had awakened petitioner. [R.II--122] The police jerked petitioner out of the house, and thrust a clip board to his stomach, insisting that he sign it. [R.II--91, 92, 112-113]

Most of the police officers denied that they personally drew their guns, and were unable to recall seeing their colleagues with drawn guns. [R.II--155; 183; 223; 261] One officer, detective Rudy Buenrostro, however, testified that he had his gun drawn during the arrest, until he holstered it to read petitioner his "rights." [[MTS--468] Buenrostro's testimony on this point was unequivocal: "I know I had mine drawn." [MTS--468][emphasis supplied]. Buenrostro also testified that "between five and ten minutes passed between his arrival and the time he read

[petitioner] his rights." [MTS--424]

Detective Robert Urban testified that petitioner was not coerced in anyway, and that his gun was not drawn. [R.II--223, 242] He admitted telling petitioner:

> If you got nothing to hide go ahead and sign this, if you don't sign it then I will have to go and get a search warrant.

[R.II--244][emphasis supplied]. And:

> And also explained to him if he didn't sign it, we would go and get a search warrant.

[R.II--224][emphasis supplied]. And:

> I told him, if he refused to sign, I told him he could refuse to sign, if he refused to sign, I'm going to get a search warrant.

[R.II--236][emphasis supplied].

Petitioner did sign the consent to search [R.X--2275] and the police searched his home, his yard and a 1959 green Buick.

A large amount of evidence was seized which tended to link him to circumstantially to the abduction and assault of Ms. Moran. Unquestionably, without this evidence, there would have been no support for the conviction in this case.

The trial court overruled petitioner's motion to suppress and this evidence was admitted at trial. [R.II--285] The suppression issue was not raised again on direct appeal, and was therefore not considered by the Texas Court of Criminal Appeals.

The district court refused to consider the search and seizure claim under Stone v. Powell, 478 U.S. 465 (1976). The court rejected petitioner's argument that Stone's rule of preclusion is not applicable because appellate counsel was

ineffective in not raising the suppression on direct appeal. Franklin v. McCotter, No. SA-86-CA-608 (W.D. Tex. July 9, 1986). The Court of Appeals did not discuss this issue in its opinion.

III.

(Failure to Instruct the Jury on Mitigating Evidence)

Petitioner submitted five special requested jury charges seeking instruction regarding consideration of mitigating evidence at the punishment phase of this capital murder prosecution. [R.I--47-51] These requested instructions were refused and the jury was not instructed in any manner whatsoever concerning mitigation. [R.I--53-54] The district court held that the trial court did not err in failing to so instruct the jury. Franklin v. McCotter, supra, slip op. 2. The Court of Appeals did not discuss this ground of error.

IV.

(Appellate Counsel Rendered Ineffective Assistance)

Petitioner contended his appellate counsel was ineffective because he failed to raise both the suppression issue [See "II" above] and the trial court's failure to instruct on mitigating evidence. [See "III" above] The district court rejected this ground of error. Franklin v. McCotter, supra, slip op. 11. The Court of Appeals did not discuss it.

V.

(Improper Exclusion of Venireperson Santana)

Venireperson Flavia Santana stated that, due to the seriousness of the case, she would "want to be more than

reasonably convinced;" that her deliberations would be more careful; that her personal assessment of what a reasonable doubt was would be stricter; and, that her "level . . . for reasonable doubt is very high," and that that limit "is very close to one hundred percent." [R. V--1189-1196]

Based on these responses, the state's challenge for cause was granted, over petitioner's objection. [R.V--19985-96]

The district court rejected this ground of error based on the magistrate's recommendation. Franklin v. McCotter, supra, slip op. 1. The Court of Appeals did not discuss the issue.

VI.

(Special Issue Number One is Meaningless)

Two special issues were submitted to the jury at punishment as required by TEX. CODE CRIM. PROC. ANN. art. 37.071(b). The first special issue asks:

> whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.

TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1). When both special issues were answered affirmatively by the jury the trial court sentenced petitioner to death, as required by Texas law. TEX. CODE CRIM. PROC. ANN. art. 37.071(e). No. mitigating instructions were given. Petitioner complained of this in his petition for writ of habeas corpus. Based on the findings of the magistrate, the district court rejected this point. Franklin v. McCotter, slip op. 1. No mention of this issue was made by the

Court of Appeals.

VII.

(Submission of Two Separate Offenses in a Single Paragraph of the Jury Charge)

The first paragraph of the indictment alleged capital murder in the course of committing and attempting to commit kidnapping. The second paragraph alleged capital murder in the course of committing and attempting to commit robbery. [R.I--2] The trial court overruled petitioner's motion to require the state to elect, [R.XII--2737] and both paragraphs were submitted to the jury. In fact, both paragraphs were submitted to the jury in a single application paragraph, number nine, which authorized conviction upon a finding of murder "in the course of committing and attempting to commit the offense of robber or kidnapping." [R.I--31][emphasis supplied] The jury returned a general verdict of "guilty of capital murder." [R.I--38]

The Court of Appeals was initially "concerned" about this contention, but resolved it by looking at the trial record. Since there was ample evidence of both a kidnapping and a robbery, the court found that this issue "lacks any substance whatever, despite its abstract plausibility." Franklin v. Lynaugh, supra, 823 F.2d at 98.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATE DID NOT USE PETITIONER'S POST ARREST SILENCE AGAINST HIM, IN VIOLATION OF DOYLE V. OHIO.

Both the Texas Court of Criminal Appeals and the United States District Court below agreed that detective Urban's statement. "I talked to him but he refused to talk to me," constituted an impermissible comment on petitioner's exercise of his right to remain silent. E.g., Franklin v. State, 693 S.W.2d 420, 428 (Tex. Crim. App. 1985). Clearly, under the Fifth and Fourteenth Amendments of the United States Constitution, it did. E.g., Doyle v. Ohio, 426 U.S. 610, 618 (1976); United States v. Luna, 539 F.2d 417, 417 (5th Cir. 1976); United States v. Harp, 536 F.2d 601, 603 (5th Cir. 1976). Both courts, however, went on to hold that this error was harmless. E.g., Franklin v. State, supra, 693 S.W.2d at 428-429.

The Court of Appeals took a different approach. Noting that this was a single reference, followed by a sustained objection and an instruction to disregard, the Court held that, under Greer v. Miller, supra, the trial court had not permitted the use of petitioner's silence against him. Franklin v. Lynaugh, supra, 823 F.2d at 99. Petitioner respectfully disagrees.

In Greer, this Court held that Doyle is not violated where post arrest silence is not used. Greer, however, is distinguishable on its facts. There, unlike here, there was no completed Doyle violation. Rather, there was only an attempted violation. Greer v. Miller, supra, 107 S. Ct. at 3109. The prosecutor attempted to violate Doyle by asking, "Why didn't you tell this story to anybody when you got arrested?" Id. at 3105. Before the question could be answered, the trial court sustained

defense counsel's objection, and instructed the jury to disregard the question. Id.

> The fact of Miller's postarrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference, and thus no Doyle violation occurred in this case.

Id. at 3108.

In the present case, in contrast, petitioner's post arrest silence was submitted to the jury when detective Urban testified "I tried to talk to him but he refused to talk to me." That is, there was more than simple an unanswered question by the prosecutor. Accordingly, unlike in Greer, it cannot fairly be said here that post arrest silence was not used. The Court of Appeals erred when it held that: "Greer is on all fours; it controls." Franklin v. Lynaugh, supra, 823 F.2d at 99.

Instead the proper question, and a question not reached in Greer, is whether or not this Doyle error was harmless. The proper standard of review is found in Chapman v. California, 386 U.S. 18 (1967).

In Chapman this Court held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Id. at 22.

> The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

Id. at 23. The burden is on the state, when it seeks to invoke

the harmless error rule, to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24.

Chapman mandates examination of the "setting of a particular case," and indeed, it is the setting of this case which makes it clear that the Doyle violation here was not harmless. Any capital murder case necessarily is possessed of horrible facts. See Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980). The facts here are notably horrible, however, and the single most notable fact is that the victim was left for dead in an open field and had to endure exposure for five days in the July sun, slowly bleeding to death from seven stab wounds, infested with insects. This fact was not lost on the prosecution which took every opportunity to remind the jury. [R.IX--2035-36; XIII--2875; 2882-83; XIV--2979] Based on these facts the state could persuasively assert that this was "one of the most sensational . . . cases in Bexar County history." [R.XIII--2902] Considering the context, the inflammatory impact of the question and response are unmistakable. Petitioner, who was arrested and questioned within hours of the abduction, and who was the one person according to the state who could have prevented the suffering and indeed the death of Ms. Moran, chose instead to remain silent. It is difficult to believe that the jury, which convicted petitioner and sentenced him to die, did not consider the fact that his silence was itself the cause of this tragedy. In light of the peculiar relationship between petitioner's silence and the

terrible facts adduced, it is wrong to call this violation harmless.

The Court of Appeals erred in applying the rule of law of Greer v. Miller to the facts in the present case because here, unlike Greer, petitioner's post arrest silence was used against him. Considering the facts of this case, it cannot be said that this error was rendered harmless, either because it was a single reference, or because the jury was promptly instructed to disregard. Certiorari should be granted in this case because the Court of Appeals' opinion below conflicts with Doyle v. Ohio.

II.

THE LOWER COURTS ERRED IN REFUSING TO CONSIDER THE SUPPRESSION ISSUE UNDER STONE V. POWELL.

In Stone v. Powell, 428 U.S. 465 (1976) the Court held that "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Id. at 494. Here petitioner, through no fault of his own, was not afforded any opportunity whatsoever to have the state appellate court resolve his Fourth Amendment question. As pointed out in ground of error four, infra, appointed counsel on direct appeal did not raise this question and it was therefore not considered by the Texas Court of Criminal Appeals. In light of counsel's ineffective assistance on appeal, it cannot be said that petitioner was afforded Stone's

opportunity for full and fair litigation of his Fourth Amendment claim.

Despite the fact that counsel on direct appeal did not raise the suppression issue, the lower courts held that Stone bars review both because petitioner litigated the issue at the trial level, and because the "opportunity for full and fair litigation," required by Stone, means only that the state courts must provide a procedural vehicle for litigating Fourth Amendment claims. Both case law and logic plainly oppose these conclusions.

Initially, petitioner notes that the holding below conflicts with Stone v. Powell itself. In Stone, unlike the present case, petitioners had actually litigated their Fourth Amendment claims on direct appeal in state court. Id. at 470, 472. And the language used in Stone must be examined carefully. Justice Powell framed the question there to be whether petitioners, who had already been given opportunity for consideration by the state courts, "may invoke their claim again on federal habeas corpus review." Id. at 489 (emphasis supplied) Obviously to invoke one's right again, one must have actually invoked it before. Dunn v. Rose, 504 F. Supp. 1333, 1336 (M.D. Tenn. 1981).

Additionally, the holding below conflicts with numerous holdings from the Fifth Circuit Court of Appeals. Scott v. Maggio, 698 F.2d 916 (5th Cir. 1983) is the case most clearly on point.

In Scott, the defendant had raised his Fourth Amendment

claim, not on direct appeal, but by way of petitions for mandamus and prohibition, which were refused by the Louisiana Supreme Court in an unpublished order. Id. at 918. After collateral relief was denied in state court, defendant took his Fourth Amendment claim to federal court by way of 28 U.S.C. § 2254. In determining whether Stone barred review, the Fifth Circuit observed that there was nothing in the opinions or orders by the Louisiana Supreme Court to affirmatively indicate that Scott's Fourth Amendment claims had actually been considered by that court. Consequently, that court may have "failed to consider fully the multiple claims of a habeas petitioner." Id. at 919. Acknowledging Stone's general rule of preclusion, the Fifth Circuit nonetheless went on to decide the Fourth Amendment issues:

> But since these were not discussed, it can fairly be argued that Scott has not been presented with the full and fair opportunity of which Stone v. Powell speaks. In light of this, we assume, without deciding, that we are empowered by Stone v. Powell to pass on the merits of the Fourth Amendment claims raised by Scott's habeas petition.

Id. at 920 (emphasis supplied) Thus despite Stone v. Powell, the Court considered, and rejected on the merits, Scott's Fourth Amendment claims. Id.

In the present case, just as in Scott, the appellate court in Texas has not yet written a single word on petitioner's Fourth Amendment claim, nor has it otherwise indicated in any way that it has considered same. Indeed, the present case presents even stronger facts than Scott v. Maggio, because here, unlike in

Scott, petitioner's claims were never even presented to the Texas Court of Criminal Appeals prior to collateral review, due to the ineffectiveness of appellate counsel. Therefore, "it can fairly be argued that [petitioner] has not been presented with the full and fair opportunity of which Stone v. Powell speaks." Id.

The following cases are additional support for petitioner's contention that Stone v. Powell does not bar consideration of his Fourth Amendment issue: Smith v. Wainwright, 581 F.2d 1149, 1151 (5th Cir. 1978)(indication that Fourth Amendment issue was considered on appeal places this case "squarely into the interdiction of Stone"); Gibson v. Jackson, 578 F.2d 1045, 1053 (5th Cir. 1978)(discussing conclusive effect of Stone where defendant is unrepresented by counsel); Tackno v. Blackburn, 571 F.2d 1383, 1384 (5th Cir. 1978)(no error in failing to review search issue where the issue was actually considered on direct appeal, despite late filing of brief); Sosa v. United States, 550 F.2d 244, 249 (5th Cir. 1977)(opportunity "must include . . . one decision by an appellate court)(emphasis supplied); O'Berry v. Wainwright, 546 F.2d 1204, 1213 (5th Cir. 1977)("the full and fair consideration requirement satisfied where the state appellate court . . . gives full consideration to defendant's Fourth Amendment claims").

Common sense compels the conclusion that Stone's "opportunity for full and fair litigation" means more just than that the state must have a procedural device for pursuing Fourth Amendment claims. Since every state must presumably have such a

device in order to effectuate the mandate of Mapp v. Ohio, 367 U.S. 643 (1961), Stone v. Powell's "opportunity" would be meaningless if this is all that was required. Surely the Supreme Court of the United States did not intend a useless thing. See Dunn v. Rose, 504 F. Supp. 1333, 1336 (M.D. Tenn. 1981). In the present case, of course, in light of his counsel's ineffectiveness, petitioner had no opportunity whatsoever for appellate review, much less meaningful appellate review. In Gibson v. Jackson, 578 F.2d 1045, 1053 (5th Cir. 1978) Judge Rubin wrote that Stone v. Powell did not bar relief there where defendant had been unrepresented by counsel, since Stone provides for conclusive effect only if the petitioner has been afforded "an opportunity for full and fair litigation of (his) Fourth Amendment claim." Id. If Stone is inapplicable where petitioner is unrepresented, it surely can not apply where his court appointed counsel ineffectively elects not to present the issue on appeal, hence leaving his client unrepresented as to this issue.

The requirement of appellate review is heightened in this capital case. Under TEX. CODE CRIM. PROC. ANN. art. 37.071(h) the judgment of conviction in this case was subject to automatic review by the Texas Court of Criminal appeals. This requirement of prompt appellate review was cited in Jurek v. Texas, 428 U.S. 262 (1976) as a "means to promote the evenhanded, rational, and consistent imposition of death sentences under law." Id. at 276. It would be untenable for this Court to sustain the decision

below that Stone does not require appellate review, in light of the Jurek's holding that prompt appellate review is one of the safeguards insuring the constitutionality of the Texas capital punishment scheme.

The lower courts erroneously failed to consider petitioner's meritorious suppression issue. This error stemmed from a misinterpretation of this Court's decision in Stone v. Powell. This writ should be granted so that this Court can determine whether the doctrine of Stone v. Powell can be applied to preclude consideration of a Fourth Amendment claim where that claim was not raised on direct appeal due to the ineffectiveness of counsel.

III.

THE FIFTH CIRCUIT ERRED IN HOLDING THAT MITIGATING INSTRUCTIONS NEED NOT BE GIVEN OUT THE PUNISHMENT PHASE OF A CAPITAL MURDER PROSECUTION

The lower courts relied on Jurek v. Texas, 428 U.S. 262 (1976); Zant v. Stephens, 462 U.S. 862 (1983); and Esquivel v. McCotter, 777 F.2d 956 (5th Cir. 1985). In fact none of these cases compel the conclusion reached by the Fifth Circuit.

Jurek found that the Texas capital punishment scheme permitted consideration of mitigating circumstances, as the constitution requires. Petitioner's complaint is that this is a hollow privilege indeed if the jury is given no guidance whatsoever as to these circumstances. Indeed, it is anomalous for courts on the one hand to say that mitigating evidence may not constitutionally be limited, and, on the other hand, that

such evidence may be admitted without any guidance whatsoever to the jury. This is especially inexplicable in death penalty cases, where the Supreme Court has demanded that sentencing discretion be narrowed to insure that only the deserving suffer the ultimate punishment. E.g., Furman v. Georgia, 408 U.S. 238 (1972).

Zant v. Stephens does not require a different result. In Zant, the jury was expressly authorized by the trial court "to consider all the evidence received during the trial as well as all facts and circumstances presented in extenuation, mitigation or aggravation during the sentence proceeding." Zant v. Stephens, supra, 462 U.S. at 866. [emphasis supplied] In the present case, the jury charge did not mention mitigation or extenuation.

Nor does Esquivel v. McCotter support the holding of the court. There, at least, the jury was charged on, and considered, "the mitigating self defense factors" contained in TEX. CODE CRIM. PROC. ANN. art. 37.071 (b)(3). No such instruction was given here. [R.I--53-54]

Three members of the Texas Court of Criminal Appeals have noted the following:

> If we are insure the constitutionality of 37.071, we must not only give lip service to broadly interpretating it; we must also apply it as interpreted. This could easily be effected by requiring a jury instruction on mitigating evidence. It is folly for the Court to first acknowledge a capital murder defendant's right to produce mitigating evidence, give the jury no guidance in its use, then presume these 12 laypersons know

> the holdings of Lockett and Eddings until the defendant affirmatively proves the contrary.

Stewart v. State, 686 S.W.2d 118, 125-26 (Tex. Crim. App. 1984)(Clinton, J. joined by Teague and Miller, J.J., dissenting); See also Johnson v. State, 691 S.W.2d 6129, 27 (Tex. Crim. App. 1984)(Clinton, joined by Miller, J., dissenting). This is precisely petitioner's contention. This Court has not yet addressed the question whether mitigating instructions are required under the Texas capital scheme. This writ should be granted so that this question can be resolved.

IV.

THE FIFTH CIRCUIT ERRED IN NOT FINDING APPELLATE COUNSEL INEFFECTIVE

Petitioner asserts that appellate counsel was ineffective for failing to raise two meritorious issues on appeal--the failure to charge the jury on consideration of mitigating evidence, and the denial of the motion to suppress.

As to the jury charge issue, the lower courts disagreed with petitioner, holding that, since the trial court had not erred in overruling these charges, appellate counsel was not ineffective for not raising this issue on appeal. Petitioner has demonstrated in ground "III", above, however, that the trial court did err in failing to charge the jury consideration of mitigating evidence. Since this was in fact error which would have resulted in reversal, appellate counsel was ineffective for not presenting it to the Texas Court of Criminal Appeals.

As to the suppression issue, the district court below

determined that counsel's performance was neither deficient, nor was petitioner prejudiced, and that therefore, reversal was not required under Strickland v. Washington, 465 U.S. 668 (1984). Petitioner submits that a correct analysis of the facts of this case revels that both prongs of Strickland--deficiency and prejudice--were, in fact, met, and that the courts below erred in holding otherwise.

As to the deficient performance, the court accepted counsel's testimony. According to counsel he evaluated the suppression issue and determined that it lacked merit. Therefore, so as not to diminish his credibility and detract from other points he believed more meritorious, he chose not to brief the suppression issue. The court found that this decision represents the kind of strategy that able counsel pursue and appellate courts appreciate and was not deficient.

The flaw in this reasoning is its uncritical reliance on counsel's purported evaluation of the issue. As petitioner will demonstrate below in connection with his discussion on prejudice, the issue was more than arguable, it was meritorious. That is, had it been properly presented on appeal, petitioner's conviction would have been reversed and remanded for a new trial. And, counsel's assertion that the 12 issues he actually presented were so much more meritorious than the omitted suppression issue, is obviously erroneous. Three of the grounds actually raised had previously been clearly rejected by the Texas Court of Criminal Appeals, and five more were acknowledged by counsel himself to be

unprecedented or contrary to existing precedent. Although no attorney can be faulted for presenting issues on appeal that do not ultimately succeed, it is important here that eight of the twelve issues presented by counsel had almost no hope of success. This demonstrates the fallacy of counsel's testimony that the "twelve . . . grounds of error . . . had a significantly greater chance of success" than did the suppression and jury instruction issues. [S.F.II--23][2] In fact, by any rational standard, just the opposite is true.

Gray v. Green, 778 F.2d 350 (7th Cir. 1985) is instructive. There the Seventh Circuit held that Strickland requires the district court to

> examine the trial record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those prosecuted, will the presumption of effective assistance of counsel be overcome.

Id. at 352. Here, the suppression and jury instruction issues were clearly stronger than the majority of issues actually raised by appellate counsel. Counsel was wrong in concluding otherwise, and his performance was deficient as a result.

The court below held that in order to meet Strickland's prejudice prong, petitioner would have to establish a meritorious Fourth Amendment claim resulting in suppression of the

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2. This testimony was given at the evidentiary hearing conducted in the district court on the question of counsel's ineffectiveness.

incriminating evidence. This is, in fact, a higher standard than imposed by this Court. The Strickland opinion expressly states that the accused need not prove that counsel's deficiency was "outcome-determinative," but instead, merely a "probability sufficient to undermine confidence in the outcome." Strickland v. Washington, supra, 104 S.Ct. at 2068. See Nealy v. Cabana, 764 F.2d 1173, 1180 (5th Cir. 1985)("Even though . . . errors cannot be shown by a preponderance of the evidence to have determined the outcome of Nealy's trial, they were of sufficient gravity to undermine the fundamental fairness of the proceeding").

Even assuming, however, that petitioner was required to prove that appellate counsel's performance was outcome determinative, he has done so here. The issues not raised would have been outcome-determinative, in that they were meritorious and, had they been presented on appeal, they would have resulted in reversal. Petitioner has already discussed the merits of the jury instruction issue in ground "III", supra. A brief discussion of the facts is now necessary regarding the suppression issue.

Evidence of petitioner's guilt was circumstantial. [R.I--33] Almost all the incriminating evidence against petitioner was derived from the arrest of petitioner and the search of his automobile and home. Had this evidence been suppressed, the remaining evidence would have been insufficient to support a conviction for capital murder.

The police had neither an arrest warrant for petitioner nor a search warrant for his home or car. Instead, the validity of the search and seizures conducted here depend entirely on the validity of the consent purportedly given by petitioner. Examination of the facts reveals that this so-called "consent" was invalid for at least three reasons.

First, detective Urban testified that he told petitioner he would get a warrant if petitioner refused to consent. This testimony was positive, unequivocal, uncontradicted, and can be found in at least three places in the record. [R.II--224, 236, 244] Considering this testimony, Hudson v. State, 662 S.W.2d 957 (Tex. Crim. App. 1984), is precisely in point. There the Texas Court of Criminal Appeals noted that "this Court has determined a consent to be involuntary where an officer promised to obtain a search warrant if the subject did not consent to the search." Id. at 958 n.1. Although Hudson was decided in 1984, after counsel filed his brief, it relied on and cited a 1972 case--Paprskar v. State, 484 S.W.2d 731 (Tex. Crim. App. 1972)--for this very proposition. Additionally, the very recent case of Daniels v. State, _____ S.W._____2d, No._____, (Tex. Crim. App. delivered April 9, 1986) explicitly states that the very position urged by petitioner herein is "at least arguable." Id. at slip op. 10.

In light of this case law, it is clear that petitioner's "consent" to search was not voluntary, that is, that there was no consent at all.

Second, although other officers denied having their guns drawn or seeing colleagues with drawn guns, detective Buenrostro positively testified that his own gun was drawn at the time petitioner was arrested. [S.F.I.--468] Consent was obtained at gunpoint and this is no consent at all. E.g., Paprskar v. State, 484 S.W.2d 731, 738 (Tex. Crim. App. 1972); accord, Clemens v. State, 605 S.W.2d 567, 571 (Tex. Crim. App. 1980); Lowery v. State, 499 S.W.2d 260, 167-68 (Tex. Crim. App. 1973).

Third, "consent" was tainted by the preceding warrantless, and, therefore, illegal arrest. E.g., Meeks v. State, 692 S.W.2d 504, 510 (Tex. Crim. App. 1985); Gonzalez v. State, 588 S.W.2d 355, 361 (Tex. Crim. App. 1979); Luera v. State, 561 S.W.2d 497, 498 (Tex. Crim. App. 1978); Truitt v. State, 505 S.W.2d 594, 598 (Tex. Crim. App. 1977).

Because the "consent" was invalid, so were the resultant searches and seizures. The evidence obtained therefrom was therefore inadmissible at trial and the trial court erred in overruling petitioner's motion to suppress, pursuant to the Fourth and Fourteenth Amendments of the United States Constitution. Trial counsel properly raised this issue and preserved it for appeal. Proper presentation of this meritorious issue to the Texas Court of Criminal Appeals would have caused petitioner's conviction to be reversed and the cause remanded for a new trial. Failure to present this issue, and the jury charge issue, on appeal was therefore plainly prejudicial to petitioner, since it deprived him of his right to a new trial.

Considering that both issues were meritorious, counsel was deficient in not raising them on direct appeal. This deficient performance prejudiced petitioner's chance for a new trial. That is, counsel was ineffective under Strickland v. Washington. The Fifth Circuit below erred in holding otherwise. This Court should grant this writ to correct the error.

V.

THE FIFTH CIRCUIT ERRED IN AFFIRMING THE EXCLUSION OF VENIREPERSON SANTANA IN VIOLATION OF THE PRINCIPLES SET FORTH IN ADAMS V. TEXAS

A fair reading of venireperson Santana's testimony reveals that she never once stated she would dishonestly find facts, or not follow the court's instructions, or disobey her oath. That is, she never said anything that would disqualify her under Wainwright v. Witt, 469 U.S. ____, 105 S. Ct. 844 (1985). Instead, just as the venirepersons discussed in Adams v. Texas, 448 U.S. 38, 50 (1980), Ms. Santana honestly answered that the possibility of the death penalty might "affect . . . what (she) may deem to be a reasonable doubt." Id. As the court held in Adams, such manifestation of special concern for the serious of the ultimate punishment is not grounds for disqualification.

Indeed, disqualification is all the more improper in a case like this one, where the trial judge, in keeping with the time-honored Texas tradition, refused to define for the jury the phrase "proof beyond a reasonable doubt." [R.I--34] Given that each juror was left to personally determine the definition of proof beyond a reasonable doubt, there was no basis for the trial

judge to disqualify a potential juror who honestly stated that her personal definition would be strict.

Improper exclusion of even one venireperson requires reversal of the judgment of conviction. Davis v. Georgia, 429 U.S. 122, 123, (1976). The trial court erred in excluding Santana, in violation of petitioner's right to trial by a fair and impartial jury composed of a fair cross-section of the community, equal protection of the law and due process of law guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. Because the Fifth Circuit's opinion below improperly applied this Court's holding in Adams v. Texas, supra, petitioner's writ should be granted.

VI.

THE LOWER COURT ERRED IN HOLDING THAT ARTICLE 37.071(b)(1) PROPERLY NARROWS THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY

In Jurek v. Texas, 428 U.S. 262 (1976), the petitioner attacked the entire Texas death penalty scheme, on a number of bases. This Court specifically addressed the attack on special issue number two only, noting that, at the time, the Texas Court of Criminal Appeals had not yet had occasion to construe special issue number one. Id. at 272 n.7. Concerning the second special issue, the Court rejected petitioner's contention that the statute was so vague as to be meaningless and hence unconstitutional. Id. at 274-275.

In the ensuing eleven years, the Texas courts have now had ample occasion to construe special issue number one. It is now

appropriate for this Court to take a careful look at this special issue, as it did the second special issue in Jurek, to determine whether it is so vague as to be meaningless. See Godfrey v. Georgia, 446 U.S. 420, 423 (1980)(issue whether Georgia Supreme Court had adopted such a broad and vague construction as to render statute unconstitutional). Petitioner submits that special issue number one is in fact meaningless. Certiorari should be granted to examine Tex. Code Crim. Proc. Ann. art. 37.071(b)(1) and the construction given it by the Texas Court of Criminal Appeals.

Since "intentionally" is the exclusive culpable mental state for capital murder under Tex. Penal Code Ann. sec. 19.03(a)(2), every person convicted of capital murder in the course of robbery or kidnapping has necessarily been determined to have acted intentionally. So it is when the punishment phase of the trial begins, at which time the jury must next decide, among other things, whether the defendant acted deliberately, and with the reasonable expectation that death would result, as provided by special issue number one. If intentionally and deliberately are synonymous, then special issue number one is meaningless. And, if it is meaningless, then the Texas death penalty scheme does not properly narrow the jury's discretion at sentencing. See Zant v. Stephens, 462 U.S. 862, 877 (1983) (to avoid constitutional flaw, "aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence");

Godfrey v. Georgia, 446 U.S. 420, 423 (1980)(statute which failed to narrow the class of persons eligible for the death penalty declared unconstitutional).

Justice Blackmun has grasped the meaningless of this special issue.

> It appears that every person convicted of capital murder in Texas will satisfy the other requirement relevant to Barefoot's sentence, that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result . . ." because a capital murder conviction requires a finding that the defendant intentionally or knowingly cause[d] the death of an individual.

Barefoot v. Estelle, 463 U.S. 880, 917 n.1 (1983) Blackmun, J., dissenting). Although the Texas Court of Criminal Appeals has "repeatedly and resoundingly rejected" this contention, e.g, Marquez v. State, 725 S.W.2d 217, 244 (Tex. Crim. App. 1987), its decisions are not entirely consistent. In King v. State, 631 S.W.2d 486, 502 (Tex. Crim. App. 1982), the court noted the "tremendous amount of confusion and dissension among the bench and bar over the meaning and import of the word "deliberately." In Blansett v. State, 556 S.W.2d 322, 327 n.6 (Tex. Crim. App. 1977) the court recognized the obvious: "a jury having found that defendant intentionally committed a capital murder to be consistent would have to find that the act was deliberately done." And, very recently, in Gardner v. State, ___S.W.2d___, No. 69,235 (Tex. Crim. App. delivered March 25, 1987)(not yet published), it was stated that: "absent applicability of the law

of parties, it will be the extraordinary case in which evidence sufficient to prove an 'intentional' murder for purposes of Sec. 19.03(a)(2) will not also serve in whole or in part to establish that the killing was 'committed' deliberately and with the reasonable expectation that . . . death . . . would result."'

Reading these three cases together, one must visualize a confused jury, rendering inconsistent verdicts in all but extraordinary cases. Surely such was not contemplated by the Supreme Court when it laid down its mandate in Furman v. Georgia, 408 U.S. 238 (1972).

In 1976 the United States Supreme Court upheld the facial validity of the Georgia capital scheme. Gregg v. Georgia, 428 U.S. 153 (1976). Four years later, in Godfrey v. Georgia, 446 U.S. 420 (1980), the Court re-opened the inquiry to determine whether the Georgia Supreme Court had adopted such a broad and vague construction of one particular subsection of the statute as to violate the Constitution. This inquiry convinced the Court that the statute was not properly channelling the sentencer's discretion by clear and objection standards that provide "specific and detailed guidance." Id. at 428. Since, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not, Godfrey's death sentence was vacated.

Petitioner submits that a similar inquiry is appropriate regarding article 37.071(b)(1). It would reveal that in 11 years of reported cases not a single one has been reversed for

insufficient evidence on special issue number one. This analysis gives substance to Justice Blackmun's observation in Barefoot that this special issue is in fact not an issue at all once a defendant has been convicted of capital murder. To state it another way, article 37.071(b)(1), and the construction of it adopted by the Texas Court of Criminal Appeals, is so broad and vague as to be meaningless. Accordingly, the Texas statute is just as unconstitutional as the Georgia statute.

In addition to being meaningless, special issue number one is absurd. Common sense teaches that there is no difference between "intentional" and "deliberate." Attorneys are unable to frame a distinction. E.g., Gardner v. State, _____S.W.2d_____, No. 69,235(Tex. Crim. App. delivered March 25, 1987), slip op. 24 (state's hypothetical "utterly fails to illustrate the intended point"); McCoy v. State, 713 S.W.2d 940, 951 n.1 (Tex. Crim. App. 1986)("we do not endorse the specific examples used"). There is ---son to think that jurors have any easier time with the ction.

To pass constitutional muster, a death penalty scheme must, at a minimum, properly narrow discretion at sentencing to prevent the arbitrary imposition of the ultimate punishment. Furman v. Georgia, 408 U.S. 238 (1972). In Texas it is the function of the special issues provided for in Article 37.071 of the Texas Code of Criminal Procedure to insure that the death penalty is not arbitrarily imposed. See Jurek v. Texas, 428 U.S. 262 (1976). Because special issue number one is meaningless, there is nothing

to prevent the arbitrary imposition of capital punishment in Texas, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

This Court recently granted certiorari in Lowenfield v. Phelps, 817 F.2d 285 (5th Cir.), cert. granted, 55 U.S.L.W. 3852 (June 23, 1987). The issue there is whether the aggravating factor at sentencing duplicates a finding made at the guilt phase. C.f. Collins v. Lockhart, 754 F.2d 258 (8th Cir.), cert. denied, 106 S.Ct. 546 (1985). This is precisely petitioner's contention here. The sentencing criterion of "deliberately" is synonymous with, and therefore duplicative of, the guilty criterion of "intentionally."

In the present case, much as in Lowenfield, once the jury found petitioner guilty of capital murder it had no legal discretion except to sentence him to death. Certiorari is appropriate to allow this Court to examine the Texas statute in the same way it will examine the Louisiana statute in Lowenfield.

VII.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ERR IN COMBINING THE DIVERGENT ELEMENTS OF TWO SPEARATE OFFENSES IN A SINGLE PARAGRAPH OF THE JURY CHARGE.

Even the most cursory examination reveals that robbery and kidnapping are composed of different elements in Texas. Compare Tex. Penal Code Ann. § 29.01 with Tex. Penal Code Ann. § 20.01.

In this ground of error petitioner contends that the trial court erred in combining the divergent elements of these two separate offenses in a single paragraph in the jury charge. This

conclusion follows logically from two well established legal conepts.

First, it is axiomatic that the state bears the burden of proving every element of the offense alleged beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684, 685 (1975). In re Winship, 397 U.S. 358, 364 (1970); U.S. Const. Amend. XIV.

Second, it is just as settled in Texas that no person may be convicted of a crime by a jury unless its verdict is unanimous. See TEX. CODE CRIM. PROC. ANN. art. 36.29(a)(Vernons 1981); TEX. CODE CRIM. PROC. ANN. art. 36.31 (Vernons 1981); TEX. CODE CRIM. PROC. ANN. art. 37.04 (Vernons 1981).

Juxtaposition of these two settled legal principles makes it obvious that one accused of a crime has a right not to be convicted unless the jury is unanimously convinced that the state has proven every element alleged beyond a reasonable doubt. Ideally, a properly drafted jury charge will protect this valuable right. See Benson v. State, 661 S.W.2d 708 (Tex. Crim. App. 1983)(sufficiency of evidence is measured by the jury charge). A charge which does not insure that a conviction is founded on the unanimous belief by the jury that the state has proved every element of the offense beyond a reasonable doubt is defective. Examination of the charge given in the present case reveals that it belongs to this letter, defective, category.

Here, paragraph nine of the charge combined the elements of two separate offenses, capital murder in the course of robbery, and capital murder in the course of kidnapping, but then

authorized the jury to return a general verdict as to only one offense--capital murder. The harm to petitioner is easily discernible. For example, it is entirely conceivable that some of the jurors in this case believed that he had committed murder in the course of robbery, as alleged in paragraph two of the indictment, but were not convinced beyond a reasonable doubt of his guilt under paragraph one, alleging murder in the course of kidnapping, while the remaining jurors believed just the opposite, that the state had proven murder/kidnapping beyond a reasonable doubt, but not murder/robbery. Such a combination of jurors could have produced the general verdict rendered here, guilty of capital murder, even though there was no unanimous concurrence on the essential elements of any one particular species of capital murder. Such procedure contravenes the well established constitutional and statutory requirement that a guilty verdict be returned by a jury unanimously convinced that every element alleged had been proven beyond a reasonable doubt.

Petitioner concedes that the state was not required to elect which paragraph would be submitted to the jury. Cf. Franklin v. State, 606 S.W.2d 818 (Tex. Crim. App. 1979). It would have been permissible to submit both paragraphs to the jury in the present case, by means of a properly drafted jury charge. The proper method of submission would insure that any verdict of guilt was based on the unanimous concurrence of the jury as to every element of one particular offense.

Because there is no way to determine whether petitioner was

convicted of a single offense by a unanimous jury, his right to due process and equal protection of the law guaranteed the United States Constitution were violated. C.f. Jackson v. Virginia, 443 U.S. 307 (1979).

The Court of Appeals below rejected this contention, after consulting the record. According to the court, this was not a "realistic objection" because "[o]n the evidence, there was little serious dispute that whoever attacked the victim both robbed and kidnapped her." In light of this "crushing, unanswerable" evidence, the court found no reversible error. Franklin v. Lynaugh, supra, 823 F.2d at 99. Petitioner respectfully submits that this holding conflicts with Connecticut v. Johnson, 460 U.S. 73 (1983). There the state argued that any error in regard to a jury instruction on intent was rendered harmless by the overwhelming evidence of intent. This Court disagreed.

> An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant.

Id. at 85-86. [emphasis supplied] The same analysis is applicable here. The evidence here was not overwhelming, but was instead circumstantial. But even assuming it had been overwhelming, that is "irrelevant," since the jury "may have

relied" upon the incorrect, disjunctive jury charge in convicting petitioner. Certiorari should be granted in light of the conflict of the decision below with Connecticut v. Johnson.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted:

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By 
MARK STEVENS

Attorneys for Petitioner

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DONALD GENE FRANKLIN,

Petitioner

v.

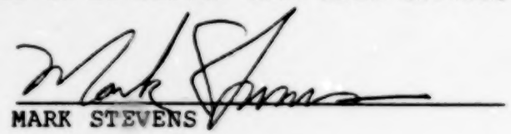
JAMES A. LYNAUGH,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I Mark Stevens, a member of the bar of this Court, hereby certify that on this 24th day of September, 1987, one copy of the Petition for Writ of Certiorari in the above-entitled case was mailed, first class, postage prepaid to Robert S. Walt, Assistant General for the Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711, counsel for the respondent herein. I further certify that all parties required to be served have been served.


MARK STEVENS

sion in the government's favor on the merits, it is evident that this exception would not apply in the instant case. Moreover, equitable jurisdiction does not exist here because it is well established that a taxpayer's right to sue for a refund under 26 U.S.C. § 7422 provides an adequate remedy at law. *See Zernial v. United States*, 714 F.2d 431, 434 (5th Cir.1983). We therefore conclude that 5 U.S.C. section 702 is unavailable to the plaintiffs, and the United States has not waived its sovereign immunity against the instant suit.

[5] As the government notes, the Supreme Court has recognized two exceptions to the doctrine that sovereign immunity, absent specific statutory consent to suit, bars suit against the sovereign. Sovereign immunity does not bar suit (1) where the federal officers in question act beyond their statutory powers, or (2) where the statutory powers exercised, or the manner in which they are exercised, by the federal officers are unconstitutional. *Dugan v. Rank*, 372 U.S. 609, 621–22, 83 S.Ct. 999, 1006–07, 10 L.Ed.2d 15 (1963). Plaintiffs have not challenged the constitutionality of section 6166 of the Internal Revenue Code or its application in their case. Nor does the complaint allege, or the opinion of the district court find, any action by the IRS that could be characterized as *ultra vires*. An exception to the bar of sovereign immunity cannot be established on the facts before us.

III.

Because the doctrine of sovereign immunity bars the plaintiffs' suit, the judgment of the district court is REVERSED as beyond its jurisdiction and this cause is REMANDED for dismissal without prejudice of plaintiffs' claims.

Donald Gene FRANKLIN, Petitioner-Appellant,

v.

James A. LYNAUGH, Interim Director, Texas Department of Corrections, Respondent-Appellee.

Nos. 86-2538, 86-2883.

United States Court of Appeals, Fifth Circuit.

July 30, 1987.

State prisoner who had been convicted of murder petitioned for habeas corpus. Relief was denied by the United States District Court for the Western District of Texas, at San Antonio, H.F. Garcia, J., and petitioner appealed. The Court of Appeals held that: (1) relief was not warranted by improper reference to petitioner's postarrest silence after *Miranda* warning; (2) relief was not warranted on statistics claim that murder statute was applied discriminatory way against blacks who murdered whites; and (3) relief was not warranted on basis of charge which could have permitted jury to convict defendant of capital murder for killing committed in the course of felony when some jurors may have believed that felony was robbery while others thought it was kidnapping.

Stay of execution vacated and judgment affirmed.

See also, 106 S.Ct. 1238.

1. Habeas Corpus ⇐45.2(7)

Improper reference to petitioner's postarrest silence after he received his *Miranda* warnings did not warrant habeas relief where sustained objection and instruction to disregard followed the improper question.

2. Habeas Corpus ⇐45.2(3)

Statistics-based claim that Texas murder statute was applied in a discriminatory way against blacks who murdered whites did not warrant habeas relief.

3. Habeas Corpus ⇐45.2(7)

Charge which could have permitted jury to convict petitioner of capital murder for killing committed in the course of a felony, when some of the jurors may have believed that the felony was robbery while others thought it was kidnapping, did not warrant habeas relief where there was little serious dispute that whoever attacked the victim both robbed and kidnapped her and the major defense was mistaken identity.

Mark Steven, Allen Cazier, George Scharmen, San Antonio, Tex., for petitioner-appellant.

William C. Zapalac, Asst. Atty. Gen., Jim Mattox, Atty. Gen., Austin, Tex., for respondent-appellee.

Appeals from the United States District Court for the Western District of Texas.

Before GEE, RANDALL, and DAVIS, Circuit Judges.

PER CURIAM:

There is small occasion for us to rehearse the sickening facts of this murder, one in which an innocent victim who stepped into the wrong place at the wrong time was stabbed, raped and left to bleed to death for five days in the July sun of Texas. These are set forth at length in the various opinions on direct appeal, e.g., 606 S.W.2d 818 (Tex.Crim.App.1979). Nor need much be said on the law, it having developed and set against petitioner's contentions over the course of the twelve years since his crime. We affirm the trial court's judgment denying habeas relief on the basis of that court's opinions, adding a few observations chiefly based on events occurring since that court ruled.

[1] Of petitioner's points, the most nearly meritorious is that complaining of an improper reference to petitioner's postarrest silence after he had received *Miranda* warnings. Since the handing down of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), comments by the prosecutor on the post-arrest silence of a defendant after the administration of *Miranda* warnings have been taboo. The Supreme Court has now held, however, that such a question as the prosecutor asked in this case does not require a grant of habeas relief where no *use* of the fact of petitioner's silence is permitted by the court. *Greer v. Miller*, — U.S. —, 107 S.Ct. 3102, 95 L.Ed.2d —, 55 U.S.L.W. 5126 (1987). Here there was none; a sustained objection and an instruction to disregard followed hard on the improper question. It was never heard of again. *Greer* is on all fours; it controls.

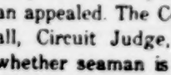
[2] The next most troubling was a statistics-based claim that the Texas murder statute is applied in a discriminatory way against blacks who murder whites. Petitioner's claims in this respect have been resolved against him by the Court's opinion in *McCleskey v. Kemp*, — U.S. —, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

[3] Finally, we were concerned by petitioner's contention that the wording of the trial court's charge was such as to have permitted the jury to have convicted petitioner of capital murder for a killing committed in the course of a felony, when some jurors may have believed that the felony was robbery, while others thought it kidnapping.[1] While, on the words of the court's charge standing alone, this may seem a realistic objection, when the record is consulted, it is not. On the evidence, there was little serious dispute that whoever attacked the victim both robbed and kidnapped her. Petitioner's defense disputed these matters only pro forma, his major claim was that he was not the perpetrator of the crime, that his indictment was the result of mistaken identity. The evidence supporting the commission of both felonies was crushing, unanswerable; the only question was, who did them? In these circumstances, the claim that some jurors

1. The portion of the charge in question authorized conviction on a finding of murder "... in the course of committing and attempting to commit the offense of robbery or kidnapping (emphasis supplied).

may have thought Franklin only a kidnapper while others thought him only a robber lacks any substance whatever, despite its abstract plausibility. The jury faced only one real question: whoever did this thing did both robbery and kidnapping, but was it Franklin?

The jury found that it was. For whatever it adds, we agree. The stay of execution earlier granted is VACATED, and judgment is AFFIRMED.



James BREESE, Jr.,
Plaintiff-Appellant Cross-Appellee,

v.

AWI, INC., Defendant-Appellee Cross-Appellant.

No. 86-3607
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

July 30, 1987.

Disabled seaman brought action seeking damages under Jones Act and general maritime law, based upon shipowner's purported bad-faith failure to pay maintenance and cure following heart attack. The United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, J., determined that seaman was not entitled to recover attorney fees and punitive damages. Seaman appealed. The Court of Appeals, Randall, Circuit Judge, held that question of whether seaman is entitled to maintenance turns on whether individual seaman has reached maximum cure, which is medical question, not legal one, so that reliance on advice of counsel, as opposed to advice of physician, is insufficient to constitute reasonable investigation of seaman's right to maintenance and cure of situation where a counsel is not advised as to seaman's medical condition.

Affirmed in part; and reversed in part and remanded.

1. Federal Courts ⇐868

District court's factual findings underlying its conclusion of whether failure to pay disabled seamen maintenance and cure was arbitrary and capricious are, like other factual findings, reviewed under clearly erroneous standard. Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

2. Federal Courts ⇐813, 830, 868

In determining whether district court erred in concluding that disabled seaman was not entitled to award of punitive damages and attorney fees based upon ship owner's purported bad-faith failure to pay maintenance and cure following heart attack, Court of Appeals first inquired as to whether district court's findings that shipowner's conduct investigating claim was not callous or arbitrary and capricious were clearly erroneous, and second inquired as to whether district court's failure to award punitive damages and attorney fees amounted to abuse of discretion. Fed. Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

3. Seamen ⇐11(9)

In determining whether ship owner has arbitrarily and capriciously denied maintenance and cure to injured seaman so as to make shipowner liable for punitive damages and attorney fees, each case is to be evaluated on its own facts.

4. Seamen ⇐11(9)

Shipowner's investigation of disabled seaman's claim, which investigation did not include inquiry of any physician, much less seaman's treating physicians, or review of any of seaman's medical records, was impermissibly lax under any reasonable standard, rendering shipowner's decision not to pay maintenance and cure beyond seaman's discharge from hospital arbitrary and capricious, for purpose of determining shipowner's liability for punitive damages and attorney fees.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DONALD GENE FRANKLIN,

Petitioner

VS. SA-86-CA-608

O.L. McCOTTER, Director
Texas Department of Corrections,

Respondent

MEMORANDUM OPINION

On this day came on to be considered petitioner's application for writ of habeas corpus, filed pursuant to 28 U.S.C. Section 2254. The application was referred to United States Magistrate Jamie C. Boyd to conduct an evidentiary hearing, to review state court records and to submit proposed findings of fact and conclusions of law and a recommendation for disposition to this Court. Magistrate Boyd concluded that petitioner was not entitled to relief, and that the application should be denied. Petitioner has timely objected to the report. This Court has conducted a de novo review by reading and considering the pleadings, the transcript of the evidentiary hearing, the state court records, and the applicable law. Having done so, it is the opinion of this Court that the recommendation should be adopted. Petitioner's claims A, E, F, G, H, I, J, and K were adequately addressed by Magistrate Boyd, lack merit, and need not be discussed again.

In claim C, petitioner contends that the state trial court erred in failing to include in its jury charge,

instructions regarding the jury's consideration of mitigating evidence. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that a death penalty statute which does not permit the sentencer to consider mitigating factors, violates the Eighth and Fourteenth Amendments. The current Texas death penalty law, Article 37.071 of the Texas Code of Criminal Procedure, was upheld in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The Supreme Court, after noting that the Texas statute does not explicitly speak of mitigating circumstances, found that it did permit the jury to consider whatever evidence of mitigating circumstances the defense wishes to introduce. Id. at 272-73, 99 S.Ct. at 2956-57. Although the decision in Jurek preceded that in Lockett, it is clear that Article 37.071 complies with the requirement of Lockett. The Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances. Zant v. Stephens, 462 U.S. 862, 890, 103 S.Ct. 2733, 2750, 77 L.Ed.2d 235 (1983). The failure to so instruct the jury in this case was not error. See, Esquivel v. McCotter, 777 F.2d 956 (5th Cir. 1985). Since there was no error, petitioner's appellate counsel could not be ineffective for failing to raise that issue on appeal.

Petitioner also challenges the state trial court's order overruling his motion to suppress evidence. He sought to suppress various items of incriminating evidence seized from his home and car after he signed a consent-to-search form. The State

contends and the Magistrate found that consideration of this issue by this Court is foreclosed by Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). In Stone, the Supreme Court held that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. Id. at 494, 96 S.Ct. at 3052. The Fifth Circuit has interpreted "full and fair" consideration to include at least one evidentiary hearing in a trial court, and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute. O'Berry v. Wainwright, 546 F.2d 1204, 1213 (5th Cir. 1977). If a State provides the processes whereby a defendant can obtain full and fair litigation of a Fourth Amendment claim, Stone v. Powell bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes. Caver v. State of Alabama, 577 F.2d 1188, 1192 (5th Cir. 1978). See, Christian v. McCaskle, 731 F.2d 1196, 1199 n.1 (5th Cir. 1984). In the absence of allegations that the processes are routinely or systematically applied in such a way as to prevent the actual litigation of Fourth Amendment claims, federal review is precluded. Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980). Petitioner has made no such contentions.

Twice the motion to suppress was heard and overruled. Prior to the first trial and then prior to the third trial,

evidence was presented on the Fourth Amendment claim. Petitioner had every opportunity to cross-examine the State's witnesses, to challenge the State's exhibits, to present his evidence, and to argue his position. At the second hearing, the trial judge made several relevant inquiries of the witnesses and stated that he had read the cases pertinent to the suppression issue. In neither his first appeal (Franklin v. State, 606 S.W.2d 818 (Tex.Crim.App. 1978)) nor his third appeal (Franklin v. State, 693 S.W.2d 420 (Tex.Crim.App. 1985)) did petitioner challenge the trial court's rulings, despite the opportunity to do so. Not until April 3, 1986, in his state application for writ of habeas corpus, did he present the Fourth Amendment claim to the Texas Court of Criminal Appeals, which denied it. The application had previously been denied by the trial court which held that the issue was not cognizable in a post-conviction habeas corpus proceeding. Petitioner asserts that ineffective assistance of his appellate counsel, an issue to be discussed below, in failing to raise the Fourth Amendment claim on direct appeal, precluded him from having an opportunity for full and fair litigation. This Court believes that, while this failure can be reviewed under the Sixth Amendment, it does not affect the application of Stone v. Powell. Having read the transcripts of the state court suppression hearings, this Court is firmly convinced that petitioner's motion hinged exclusively on disputed facts. Petitioner received full and fair litigation of his suppression claim in state trial court and had the availability of meaningful

appellate review; federal habeas corpus cannot lie. See, O'Berry v. Wainwright, 546 F.2d at 1213.

In the final point to be addressed, petitioner contends he was denied the effective assistance of counsel on appeal because of counsel's failure to raise the Fourth Amendment issue. Until recently, whether Stone v. Powell precluded a Sixth Amendment claim such as this was undecided. Lockhart v. McCotter, 782 F.2d 1275, 1279 n.7 (5th Cir. 1986). In Kimmelman v. Morrison, 54 U.S.L.W. 4789, decided June 26, 1986, the United States Supreme Court held that federal habeas relief is available in such situations. Examination of the claim is, therefore, appropriate, since petitioner has a right to the effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. ____, ____, 105 S.Ct. 830, 836-37, 83 L.Ed.2d 821 (1985).

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established a two-pronged test for determining the effectiveness of counsel's performance. The defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. 104 S.Ct. at 2064. In determining whether counsel's performance was deficient, the relevant inquiry is whether counsel's representation fell below an objective standard of reasonableness according to prevailing professional standards. Id. at 2065. The reviewing court must give great deference to counsel's assistance, strongly presuming that counsel has exercised reasonable professional judgment. Lockhart v. McCotter, 782 F.2d at 1279.

At the evidentiary hearing before Magistrate Boyd, testimony was elicited that petitioner's appellate counsel was deficient in failing to appeal the suppression issue. Allen Cazier, trial counsel for petitioner at the third trial, testified that whether petitioner voluntarily consented to the search of his house and car was the "most significant issue" in terms of his defense. Cazier discussed the search issue with David Chapman, petitioner's appellate counsel, and encouraged him to raise it. Gerald Goldstein, a highly competent and respected criminal defense lawyer, testified that in a capital murder case, appellate counsel should raise arguable claims, which Goldstein believed, from reading petitioner's application for writ of habeas corpus, encompassed the Fourth Amendment claim here. David Weiner, an experienced criminal appeals lawyer, echoed this belief.

In Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), the Supreme Court held that a defendant has no constitutional right to compel appointed counsel to press non-frivolous points on appeal. The appellate advocate must be allowed to examine the record with a view to selecting the most promising issues for review. Id. at 752, 103 S.Ct. at 3313.

> "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders [v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)].
> Id. at 754, 103 S.Ct. at 3314.

This Court perceives no distinction between "arguable" and "colorable" claims. The belief that appellate counsel should raise all arguable claims does not comport with Jones. See, Evitts v. Lucey, 105 S.Ct. at 835.

The testimony of Chapman establishes his reasons for choosing not to raise the suppression issue. He spent approximately ninety hours on the appeal. He researched and investigated the search and seizure issue, and took extensive notes from the record. Chapman believed that, for petitioner to prevail on appeal, the Texas Court of Criminal Appeals would have to find that the testimony of the police officers was false. He did not believe the appellate court would second-guess the credibility choices of the trial courts. As mentioned above, petitioner's motion presented credibility choices almost exclusively. As noted by Goldstein and Weiner, such situations make reversal more difficult because of the stringent standard for review. Chapman believed that the search question was not meritorious, and had virtually no chance of success. The testimony of Goldstein and Weiner to the contrary, which was based solely upon a reading of petitioner's application for writ of habeas corpus, and not upon a review of the state court briefs or transcripts, is unpersuasive. Chapman chose not to present the issue because it would diminish his credibility and detract from the grounds of error he believed did have merit. See, Jones v. Barnes, at 753, 103 S.Ct. at 3313. Chapman's research and investigation and his decision to raise only those points he believed had some plausible merit, represents the kind of

strategy that able counsel pursue and appellate courts appreciate. See, Wicken v. McCotter, 783 F.2d 487, 497 (5th Cir. 1986). His representation of petitioner on appeal was not deficient.

While this finding is sufficient to justify denial of the ineffective assistance claim, the Court feels it appropriate, because this is a death penalty case, to also discuss its belief that petitioner suffered no prejudice from the failure to appeal the Fourth Amendment claim. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. In this case, petitioner would have to establish a meritorious Fourth Amendment claim resulting in suppression of the incriminating evidence.

In his federal habeas corpus application, petitioner contends that he did not voluntarily consent to the search of his home and car. The application states that he was told by a police officer that if he did not consent, a search warrant would be obtained. Petitioner also claims he was under arrest at the time the consent was given, and that many police officers had their weapons drawn. He further contends that the arrest was illegal and tainted the subsequent consent. The allegation of a warrant threat is baseless, since petitioner, at the first suppression hearing, denied that the officer told him he would obtain a warrant if petitioner did not consent. (S.F.-I, p. 506). Such a statement could not, therefore, have been a factor in his

decision to consent. As for the illegal arrest issue, it was never presented to the trial courts. While the motion to suppress was based on the voluntariness vel non of the consent, neither the brief nor the evidence was directed to the legality of the arrest and its effect on the consent. Because of this, there is little proof of the existence or lack of probable cause to arrest. The trial courts were never given the opportunity to rule on this precise sue, and it cannot, therefore, be considered now. See, United States v. Hicks, 524 F.2d 1001, 1004 (5th Cir. 1975), cert. denied, 424 U.S. 946 (1976). Writt v. State, 541 S.W.2d 424, 426 (Tex.Crim.App. 1976). In any event, the evidence on petitioner's arrest status was conflicting. Whether petitioner was under arrest and/or warned of his constitutional rights prior to consenting were matters bearing on consent which the trial courts could consider. Some testimony indicated that the consent form was signed before he was arrested (S.F.-I, pgs. 459, 474, 476), while other evidence suggests he was arrested prior to consenting. (S.F.-I, p. 372; S.F.-III, p. 153). The trial courts were entitled to believe either scenario.

In determining whether consent was knowingly and voluntarily given, courts must analyze the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). United States v. Davis, 749 F.2d 292, 294 (5th Cir. 1985). At the first suppression hearing in December, 1975, petitioner was the only witness for the defense who was present at the scene. He testified he was jerked out of his door and pushed against a wall. (S.F.-I, p.

476). He also stated he was presented with a search warrant for his house which he was told to sign. (S.F.-I, p. 475). Because of the guns which were drawn and pointed at him, he feared for his safety and signed. (S.F.-I, p. 477). At the second suppression hearing in January, 1982, petitioner's stepfather, mother and common law wife testified that the officer's weapons were drawn and that petitioner was physically mistreated and told to sign the consent form. (S.F.-III, pgs. 90-92, 112-113, 125).

This Court believes, as did the state trial courts, that the defense version of the events lack credibility. Petitioner's previous rape conviction and his obvious keen personal interest in the outcome of the suppression hearing detract from his credibility. Not until the second hearing did petitioner's other eyewitnesses testify. Statements given by his stepfather and wife the day after the arrest do not mention that he was pulled out of the door into the yard full of police officers with drawn guns. (S.F.-III, pgs. 101, 129). The stepfather's statement indicates petitioner consented of his own choosing. (S.F.-III, p. 100). Several officers testified petitioner was not jerked or pulled from his house, and that guns were not drawn. (S.F.-III, pgs. 153-154, 183, 213, 215, 222-223, 242, 261, 266). He was asked to sign and told he did not have to sign. (S.F.-I, p. 395; S.F.-III, pgs. 153, 224). He was not forced, threatened or coerced into signing. (S.F.-III, pgs. 155, 182, 266). Petitioner never indicated he did not want to consent. (S.F.-I, pgs. 377, 416, 428-429). He read and understood the consent form, signed it and told the officers he had nothing to

hide. (S.F.-I, pgs. 334, 373-374; S.F.-III, pgs. 118, 224). The motion to suppress was properly overruled, precluding the necessary showing that appellate counsel's failure to appeal the ruling prejudiced petitioner. His ineffective assistance of counsel claim is without merit and his application for writ of habeas corpus shall be denied.

SIGNED this 9th day of July, 1986.

H.F. Garcia

H.F. GARCIA
UNITED STATES DISTRICT JUDGE

87-5546

No. ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DONALD GENE FRANKLIN,

Petitioner

v.

JAMES A. LYNAUGH,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, DONALD GENE FRANKLIN, who is now confined on death row at the Texas Department of Corrections, known as Ellis Unit, asks leave to file the attached Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The petitioner's affidavit in support of this motion is attached.

Respectfully submitted:

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Mark Stevens, a member of the bar of this Court, hereby certify that on this 24th day of September, 1987, one copy of the Motion for Leave to Proceed in Forma Pauperis in the above-entitled case was mailed, first class postage prepaid, to Robert S. Walt, Assistant Attorney General for the state of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711, counsel for the respondent herein. I further certify that all parties required to be served have been served.

MARK STEVENS

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

DONALD GENE FRANKLIN, Petitioner	)	
VS.	)	NO. SA-86-CA-608
O.L. MCCOTTER, DIRECTOR TEXAS DEPARTMENT OF CORRECTIONS, Respondent	)	

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, DONALD GENE FRANKLIN, being first duly sworn, depose and say that I am the petitioner in the above-styled and numbered cause; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, that I believe I am entitled to redress; and that the issues which I desire to present are the following:

I.

A.

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S MOTION TO SUPPRESS PHYSICAL EVIDENCE WHICH WAS SEIZED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

B.

THE TRIAL COURT ERRED IN DENYING PETITIONER'S SPECIAL REQUESTED JURY INSTRUCTIONS ONE THROUGH FIVE REGARDING MITIGATING EVIDENCE AT THE PUNISHMENT PHASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

C.

COURT APPOINTED COUNSEL ON APPEAL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO RAISE MERITORIOUS ISSUES WHICH PREJUDICED PETITIONER'S RIGHT TO REVERSAL OF HIS CONVICTION, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

D.

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S MOTION FOR MISTRIAL WHERE THE STATE COMMENTED ON HIS POST-ARREST SILENCE, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

E.

THE TRIAL COURT ERRED IN GRANTING THE STATE'S CHALLENGE FOR CAUSE OF VENIRE PERSON SANTANA IN VIOLATION OF PETITIONER'S RIGHT TO TRIAL BY A FAIR AND IMPARTIAL JURY COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY, EQUAL PROTECTION OF THE LAW AND DUE PROCESS OF LAW GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

F.

THE TRIAL COURT FUNDAMENTALLY ERRED IN COMBINING THE DIVERGENT ELEMENTS OF TWO SEPARATE OFFENSES IN A SINGLE APPLICATION PARAGRAPH OF THE JURY CHARGE BECAUSE SUCH SUBMISSION PERMITTED THE JURY TO FIND PETITIONER GUILTY WITHOUT UNANIMOUSLY BELIEVING HIM GUILTY BEYOND A REASONABLE DOUBT IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

G.

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S SPECIAL PLEA OF DOUBLE JEOPARDY BECAUSE PETITIONER WAS CONVICTED OF MURDER IN HARRIS COUNTY, AND WHERE RETRIAL FOR CAPITAL MURDER VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

H.

TEX. CODE CRIM. PROC. ANN. ART. 37.071 (b)(1) IS CONSTITUTIONALLY FLAWED AND DENIES PETITIONER HIS RIGHT TO A FAIR AND IMPARTIAL JURY, EFFECTIVE ASSISTANCE OF COUNSEL, EQUAL PROTECTION OF LAW, DUE PROCESS OF LAW, AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. BECAUSE SAID STATUTE FAILS TO PROPERLY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

I.

PETITIONER WAS DENIED A FAIR AND IMPARTIAL TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, EQUAL PROTECTION OF LAW, DUE PROCESS OF LAW AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. BECAUSE THE TRIAL COURT FAILED SUA SPONTE TO DEFINE "DELIBERATELY" AS THAT WORD IS USED IN TEX. CODE CRIM. PROC. ANN. ART. 37.071(b)(1).

J.

PETITIONER WAS DENIED A FAIR AND IMPARTIAL TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, EQUAL PROTECTION OF LAW, DUE PROCESS OF LAW AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. BECAUSE THE TRIAL COURT FAILED SUA SPONTE TO DEFINE THE PHRASE "PROOF BEYOND A REASONABLE DOUBT."

II.

Because of my indigency I am unable to pay the costs or give security in this case. My attorneys were appointed at my trial and at the appeal therefrom. My present attorneys are functioning as volunteer attorneys, without payment, to my indigency.

III.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received?

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rental payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?
No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

a. If the answer is yes, describe the property and state its approximate value.

NO. 87-5546

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Application For Stay of Execution
And Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S OPPOSITION TO REQUEST FOR STAY OF EXECUTION AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE SINGLE, ISOLATED COMMENT BY A STATE'S WITNESS ABOUT FRANKLIN'S POST-ARREST SILENCE CONSTITUTED A VIOLATION OF DOYLE V. OHIO AND, IF SO, WHETHER THE VIOLATION WAS HARMLESS BEYOND A REASONABLE DOUBT?

II. WHETHER THE COURTS BELOW CORRECTLY IMPOSED THE BAR OF STONE V. POWELL TO FRANKLIN'S CLAIM THAT EVIDENCE INTRODUCED AT HIS TRIAL WAS SEIZED DURING AN ILLEGAL SEARCH?

III. WHETHER THE CONSTITUTION REQUIRES THAT A CAPITAL MURDER JURY BE SPECIFICALLY INSTRUCTED ON THE BALANCING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES?

IV. WHETHER THE FAILURE OF COUNSEL TO RAISE ALL POSSIBLE GROUNDS OF ERROR ON APPEAL RENDERED HIS ASSISTANCE CONSTITUTIONALLY INEFFECTIVE?

V. WHETHER THE COURTS BELOW CORRECTLY ACCORDED A PRESUMPTION OF CORRECTNESS TO THE TRIAL COURT'S FINDING THAT A VENIRE MEMBER WOULD IMPOSE A GREATER BURDEN ON THE STATE THAN PROOF BEYOND A REASONABLE DOUBT AND THUS WAS EXCLUDABLE FOR CAUSE?

VI. WHETHER THE FIRST SPECIAL ISSUE SUBMITTED TO THE JURY DURING THE PUNISHMENT PHASE OF A TEXAS CAPITAL MURDER TRIAL PROPERLY NARROWS THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH SENTENCE?

VII. WHETHER FRANKLIN'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE TRIAL COURT'S INCLUSION OF THE OFFENSES OF KIDNAPPING AND ROBBERY IN A SINGLE APPLICATION PARAGRAPH OF THE CHARGE TO THE JURY.

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NO. 87-5546

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

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v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Application For Stay of Execution
And Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S OPPOSITION TO REQUEST FOR STAY OF EXECUTION AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent[1] herein, by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported below as Franklin v. Lynaugh, 823 F.2d 98 (5th Cir. 1987). A copy of the opinion is attached to the petition for writ of certiorari as Appendix A. The opinions of the United States District Court for the Western District of Texas, San Antonio Division, are not reported. Franklin v. McCotter, No. SA-86-CA-608 (W.D. Tex. July 9, 1986) is attached to the petition for writ of certiorari as Appendix B. Franklin does not challenge the disposition of Franklin v. McCotter, No. SA-86-CA-1286 (W.D. Tex. October 15, 1986), and it is not relevant to these proceedings.

[1]For clarity, Respondent is referred to as "the state," and Petitioner as "Franklin."

JURISDICTION

Franklin does not cite the basis for invoking the Court's jurisdiction. It is presumed that he relies on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Franklin bases his claims for relief on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The state has lawful and valid custody of Franklin pursuant to a judgment and sentence of the 197th Judicial District Court of Cameron County, Texas. Franklin was indicted in Cause No. 82-CR-159-C, styled The State of Texas v. Donald Gene Franklin by the Bexar County Grand Jury for the capital offense of murder of Mary Margaret Moran, committed in the course of committing or attempting to commit robbery or kidnapping, to which he entered a plea of not guilty. The trial was moved on a change of venue to Cameron County, where Franklin was tried by a jury and found guilty of capital murder. After hearing evidence relating to punishment, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981). Accordingly, on March 20, 1982, Franklin was sentenced to death by lethal injection. Venue and jurisdiction then were transferred to the 289th District Court of Bexar County, Texas.

Franklin had been convicted of the same offense twice before and sentenced to death after each conviction. The first

conviction was reversed by the Court of Criminal Appeals. Franklin v. State, 606 S.W.2d 818 (Tex. Crim. App. 1979). The trial court granted Franklin a new trial after his second conviction when it determined that the jury charge was defective. State of Texas v. Donald Gene Franklin, Cause No. 310706.

The Texas Court of Criminal Appeals affirmed Franklin's third conviction and sentence on June 26, 1985. Franklin v. State, 693 S.W.2d 420 (Tex. Crim. App. 1985). A petition for writ of certiorari was denied on February 24, 1986. Franklin v. Texas, ___ U.S. ___, 106 S.Ct. 1238 (1986). On March 13, 1986, the trial court scheduled Franklin's execution to be carried out before sunrise on April 16, 1986. Franklin filed a motion to withdraw the warrant of execution and an application for writ of habeas corpus in the trial court on April 3, 1986. The motion to withdraw the warrant of execution was denied on April 4, 1986, and the court recommended that the application for writ of habeas corpus be denied. The Court of Criminal Appeals denied a stay of execution and denied habeas corpus relief on April 8, 1986. Ex parte Franklin, Application No. 15,849-01.

On April 9, 1986, Franklin filed an application for stay of execution and a petition for writ of habeas corpus in the United States District Court for the Western District of Texas, San Antonio Division. Franklin v. McCotter, No. SA-86-CA-608. The case was referred to a magistrate who conducted an evidentiary hearing on April 30 and May 1, 1986. The magistrate filed a memorandum and recommendation recommending relief be denied. The district court issued a memorandum opinion on July 9, 1986, adopted the magistrate's findings and dismissed the petition. On July 15, 1986, the district court denied a certificate of probable cause to appeal.

While Franklin's application for certificate of probable cause to appeal was pending before the Fifth Circuit, he filed a second federal application for writ of habeas corpus in the district court. Franklin v. McCotter, Civil Action No. SA-86-CA-1286 (W.D. Tex., filed September 12, 1986). The state

responded with a motion to dismiss for abuse of the writ on September 15, 1986. The district court required Franklin to respond to the state's allegation of abuse of the writ and, after considering the justification offered, ordered the second petition dismissed pursuant to Rule 9(b), 28 U.S.C. fol. § 2254. The Fifth Circuit granted a certificate of probable cause and ordered the case consolidated with No. 86-2538, Franklin's original appeal from the denial of his first application for writ of habeas corpus. On July 30, 1987, the court affirmed the opinions of the lower court. Franklin v. Lynaugh, 823 F.2d 98 (5th Cir. 1987).

STATEMENT OF FACTS

Franklin does not challenge the sufficiency of the evidence and the facts are not in dispute. Thus, a recitation of the facts is not necessary. The first opinion of the Court of Criminal Appeals comprehensively set out the facts. Franklin v. State, 606 S.W.2d 818, 819-21 (Tex. Crim. App. 1979).

SUMMARY OF THE ARGUMENT

This case presents no important issue worthy of this Court's certiorari jurisdiction.

The single, isolated comment made by a detective witness that Franklin had refused to talk to him after being read his Miranda warnings, if error, was harmless beyond a reasonable doubt. Franklin's objection to the response was sustained and the jury was instructed to disregard it. The one comment was the only reference to Franklin's silence in an 800-page record. There was no use of the fact that Franklin invoked his right to silence and, thus, no violation. Even if the remark was error, it was harmless beyond a reasonable doubt. The state's case against Franklin was overwhelming. His only defense was that the victim's death was due to the doctor insisting that she be taken to a hospital that was not the best-equipped to handle her condition. The comment did not undermine the plausibility of his defense. Moreover, the jury knew from admissible evidence that

the victim was not found for nearly five days after Franklin's arrest. It was obvious to the jury that Franklin had not talked with police during the interim. The detective's statement did not contribute to the verdict or sentence in this case.

Stone v. Powell holds that where a state provides an opportunity for litigation of a claimed fourth amendment violation, federal habeas corpus relief is not available on the ground that evidence from an illegal search or seizure was used at trial. Case law applying Stone v. Powell makes clear that it is the opportunity to litigate the claim, not whether a defendant actually utilizes state-created procedures, that is dispositive. Texas courts afforded Franklin an opportunity to litigate the merits of his motion to suppress evidence and he had, in fact, had a hearing in the trial court. Franklin's fourth amendment claim was properly held to be barred.

Although the Constitution requires that the defendant in a capital case be permitted to present evidence in mitigation of punishment, there is no constitutional requirement that the jury be instructed on balancing mitigating and aggravating factors.

Appellate counsel need not raise every non-frivolous ground on appeal but must search the record and exercise his professional judgment as to which issues offer the best chance for success. Franklin's appellate attorney thoroughly examined the record for errors and researched the applicable law. He reasonably concluded that there was little chance of success in arguing that instructions on mitigation should have been given or that the motion to suppress had been erroneously denied. He properly limited his efforts to those issues that, in his opinion, were more likely to secure a reversal.

The courts below correctly accorded a presumption of correctness to the trial court's finding that venire member Santana was disqualified from serving on the jury because she would have held the state to a burden of proof greater than beyond a reasonable doubt. The record fully supports the finding

that the state's challenge to Ms. Santana for cause was correctly sustained.

A death sentence in Texas is predicated upon the jury's affirmative finding that the defendant acted deliberately in committing the capital murder and a finding of future dangerousness. A finding that the defendant acted deliberately is different from the finding during the guilt-innocence stage that he acted intentionally. The Texas capital sentencing statute limits the offenses for which capital punishment can be imposed, requires the jury to find a probability that the defendant will commit future acts of violence, allows the introduction of any evidence in mitigation of punishment and mandates an automatic appeal, thus insuring that the death penalty will not be imposed "wantonly" or "freakishly."

The trial court instructed the jury that it could find Franklin guilty of capital murder if it found that he committed murder while in the course of committing kidnapping or robbery. The evidence introduced at trial was sufficient to prove that Franklin had kidnapped and robbed the victim and, in the process, inflicted the wounds that resulted in her death. Under the uncontradicted evidence, a rational trier of fact could only find that Franklin was guilty under both theories of the offense. The court's instruction did not violate due process.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Franklin has advanced no special or important reason in this case, and none exists.

II.

THE SINGLE COMMENT BY A WITNESS ABOUT FRANKLIN'S POST-ARREST SILENCE DID NOT VIOLATE HIS RIGHT TO SILENCE; ALTERNATIVELY, ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

During the state's direct examination of Detective Urban, the prosecutor established that Franklin was given his warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) (SF IX 2273-74). He then asked whether the witness had had a conversation with Franklin, to which Detective Urban answered "I talked to him but he refused to talk to me." (SF IX 2279).

It is well settled that a prosecutor may not use the defendant's post-arrest silence for substantive value or impeachment purposes. Doyle v. Ohio, 426 U.S. 610 (1976). The rationale for this rule is "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." South Dakota v. Neville, 459 U.S. 553, 565 (1983). The court below relied on this Court's decision last term in Greer v. Miller, ___ U.S. ___, 107 S.Ct. 3102 (1987), in finding that no violation occurred in this case.

The prosecutor in Miller began his cross-examination of the defendant by asking why he had not told the exculpatory story he had just related at the time of his arrest. An immediate objection was sustained, the jury was instructed to disregard the question, and the court gave a general instruction in its charge that the jury was not to consider any question to which an objection had been sustained. This Court held that the protection afforded by Doyle was not abridged because the prosecutor was not allowed to undertake impeachment of the defendant's account or permitted to call attention to his silence. "The fact of Miller's postarrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference, and thus no Doyle violation occurred in this case." Greer v. Miller, ___ U.S. at ___, 107 S.Ct. at 3108.

As the court of appeals recognized, Miller is virtually identical to the instant case. Franklin v. Lynaugh, 823 F.2d at 99. Here, Franklin objected as soon as the comment was made, his objection was sustained, and the jury was instructed to disregard. No further mention was made during the trial of the fact that Franklin invoked his right to silence. Even more compelling in this case is that the remark was not used to impeach Franklin's defense. At trial, Franklin attempted to show that the victim's death was caused by her doctor's insistence that she be taken to a hospital that was not the best equipped to treat her. The comment on his silence did not undermine the plausibility of this defense. Accordingly, the court below was correct in finding no Doyle violation.

Even if the comment amounted to a constitutional violation, the error was harmless beyond a reasonable doubt. See Wainwright v. Greenfield, 474 U.S. 284, 290 n.13 (1986). A constitutional violation is harmless if the state demonstrates that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. Chapman v. California, 386 U.S. 18, 23 (1967). A review of the record here shows that any error was harmless beyond a reasonable doubt.

First, the evidence of Franklin's guilt was overwhelming. Franklin was identified by two eyewitnesses as having been in the hospital parking lot immediately prior to the victim's abduction. One of the witnesses, a security officer, found the victim's car out of its parking space and abandoned. He tried to stop Franklin's car, which sped away from the vicinity, drove through a barricade, and jumped a curb. The guard noted the car's license number. Police traced the vehicle to Franklin and obtained his consent to search it and his house. The search produced a pair of Franklin's pants soaking in rose-colored water, a muscle shirt, and a pair of shoes belonging to Franklin. All contained human blood stains, some of which matched the deceased's blood type. Plant material from the trouser cuffs matched samples from the area where the victim was found, and

fibers on the shirt matched those from the victim's sweater. A search of the trash can near Franklin's back door turned up the victim's purse, billfold, credit cards, driver's license, checkbook, and nurse's scissors. Some of the items were partially burned. Franklin's car yielded a small rope with human blood stains, and blood of the victim's type on the rear seat and carpet. Hairs matching the victim's were recovered from the car, and soil samples found under the car's fenders were the same as that in the area where the victim was found. The evidence of Franklin's guilt, though circumstantial, was overwhelming.

In addition, the remark concerning Franklin's silence occurred only once. No further reference was made to it by witnesses or the prosecutor. Franklin's objection was sustained and curative instructions were given to the jury. The remark occurred in the course of a trial that produced some 800 pages of testimony. It was not brought up during final arguments. Clearly, the remark could not have been a factor in the jury's determination that Franklin was guilty.

Finally, the comment was not used to impeach an exculpatory defense that Franklin offered at trial. As noted above, Franklin did not testify and his only defense was that the victim's death was the result of wrong decisions by her doctor. The comment that he had not talked to the police after his arrest did not undermine this contention.

Franklin argues that in the context of the particularly horrible facts of this case, the statement that he did not speak to the police officer did in fact influence the jury's verdict. The victim was left for dead in an open field, endured exposure for five days in the July sun, slowly bled to death from seven stab wounds, and was infested with insects. Franklin argues that the state purposely elicited the comment to underscore the fact that he could have prevented the tragedy by telling authorities where the body was. However, admissible evidence made the jury aware of the circumstances surrounding the death, the fact that Franklin had been arrested hours after the abduction, and the

fact that the victim's body was not discovered until several days later. Franklin is not so bold as to suggest that the jury believed that he had informed the police of the whereabouts of the body but that, because of official indifference, it was not found for five days. Detective Urban's comment did not reveal to the jury anything that it did not know from properly admitted evidence. The objected-to comment, in the circumstances of this case, was harmless beyond a reasonable doubt.

III.

FEDERAL HABEAS CORPUS IS NOT AVAILABLE TO REVIEW FRANKLIN'S CLAIM THAT EVIDENCE SEIZED IN VIOLATION OF THE FOURTH AMENDMENT WAS IMPROPERLY ADMITTED AT TRIAL.

Franklin concends that the trial court erred in denying his motion to suppress iliegally seized evidence. However, as the courts below determined, Franklin is barred from raising this claim on collateral attack.

In Stone v. Powell, 428 U.S. 465 (1976), this Court held that when a state provides the opportunity for full, fair litigation of a Fourth Amendment issue, review of such a claim is precluded in federal habeas corpus. Franklin had a full pretrial hearing on his motion to suppress evidence (SF I 80-285). He was afforded an opportunity to define the parameters of the hearing (SF I 80-81). All of the testimony from the hearing prior to the first trial on a similar motion was introduced (SF I 73-77), and Franklin presented additional evidence (SF I 83-141, 253-75). After submitting all of the evidence he deemed necessary, Franklin closed (SF I 278). He was given a full opportunity to argue the merits of the motion (SF I 281-84). At the federal evidentiary hearing, Franklin's trial attorney acknowledged that the hearing had been full and fair (FEH I 28). Because the state afforded Franklin a full and fair hearing on his Fourth Amendment claim, review is not available in these proceedings. Stone v. Powell, 428 U.S. at 495; Wicker v. McCotter, 783 F.2d 487, 497 (5th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 3310 (1986).

Franklin asserts that Stone should not apply in this case because the search and seizure issue was not raised by his attorney on appeal and, thus, was not addressed by the Texas Court of Criminal Appeals. This is irrelevant to the appropriate analysis. Stone noted that the principles underlying the exclusionary rule are not furthered by allowing Fourth Amendment claims to be raised on collateral attack. 428 U.S. at 493. If a defendant could avoid the preclusive effect of Stone merely by not utilizing the state-created mechanisms for testing the validity of a search, there would be no incentive for presenting the claims to the state courts in the first instance. Joshua v. Maggio, 674 F.2d 376, 377 (5th Cir.), cert. denied, 459 U.S. 992 (1982); see also Gibson v. Jackson, 578 F.2d 1045, 1053 (5th Cir. 1978) (addendum by Rubin, J.) ("Stone dictates that, if there is a deliberate by-pass or waiver of Fourth Amendment contentions, no federal hearing is warranted even if no state hearing whatsoever was held.").

Finally, contrary to Franklin's assertion in his petition, the courts below did review the merits of his Fourth Amendment claim, albeit under the allegation that appellate counsel was ineffective for failing to raise the claim as a ground of error. See Franklin v. Lynaugh, No. CA-86-SA-608, slip op. at 8-11. This analysis, consistent with this Court's opinion in Kimmelmann v. Morrison, ___ U.S. ___, 106 S.Ct. 2574 (1986), properly concluded that there was no merit in Franklin's contention that the evidence against him was seized in an unconstitutional search. See Part V, infra.

IV.

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT A CAPITAL MURDER JURY BE SPECIFICALLY INSTRUCTED ON BALANCING AGGRAVATING AND MITIGATING CIRCUMSTANCES AND THE COURT DID NOT ERR IN REFUSING FRANKLIN'S REQUESTED INSTRUCTIONS.

Franklin asserts that it was error for the trial court to deny his "Special Requested Charges on Punishment No. 1-5": All

of the requested instructions dealt with how the jury should consider mitigating evidence. Franklin premises his argument on the contention that the jury must be given guidance on how to deal with evidence offered in mitigation of punishment.

It is beyond dispute that a jury considering the death penalty may not constitutionally be precluded from considering whatever evidence the defendant has in mitigation of punishment. Sumner v. Shuman, ___ U.S. ___, 107 S.Ct. 2716 (1987); Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987); McClesky v. Kemp, ___ U.S. ___, 107 S.Ct. 1756 (1987); Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). This Court has made it clear that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required. The Court approved the Texas system of "narrowing the categories of murder for which a death sentence may ever be imposed." Jurek v. Texas, 428 U.S. 262, 270 (1976). It also held that one of the questions posed at the punishment stage of trial allowed the defendant to bring all relevant mitigating circumstances to the jury's attention. Id., at 273-74. Thus, the Court upheld a system of imposing capital punishment in which aggravating and mitigating circumstances are not considered at the same stage of the proceedings and not explicitly balanced against each other. Subsequent cases analyzing the individualized capital-sentencing doctrine have cited with approval the Texas statute as one permitting jury consideration of the relevant mitigating circumstances despite the lack of statutory reference to jury consideration of mitigating factors. Sumner v. Shuman, ___ U.S. at ___, 107 S.Ct. at 2720; Pulley v. Harris, 465 U.S. 37, 48-50 and n.9, 10 (1983); Barefoot v. Estelle, 463 U.S. 880, 897 (1983); Lockett v. Ohio, 438 U.S. at 606-07. The Court more recently has expressly held that:

> the Constitution does not require a State to adopt specific standards for instructing the

> jury in its consideration of aggravating and mitigating circumstances . . .

Zant v. Stevens, 462 U.S. 862, 890 (1983).

Franklin's claim that the trial court was required to give his instructions on mitigating evidence is contrary to this Court's prior decisions and is not worthy of further review.

V.

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ALL POSSIBLE CLAIMS ON APPEAL.

Franklin next asserts that his appellate attorney, the Honorable David K. Chapman, rendered ineffective assistance because he did not argue on appeal that the trial court erred in denying his motion to suppress evidence and his requested jury instructions on mitigation of punishment. Franklin argues that either of these claims, if properly presented to the Court of Criminal Appeals, would have resulted in a reversal of his conviction. By failing to have those grounds reviewed by the appellate court, Franklin contends, counsel rendered ineffective assistance.

A convicted defendant pursuing a first appeal as a right is entitled to those safeguards necessary to make the appeal adequate and effective, including the effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387 (1985). However, the constitution does not require counsel to raise every non-frivolous ground that might be pressed on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Appellate counsel's task is to present the client's case in as strong a posture as possible. This Court in Jones recognized that this often means selecting one or a few issues from among several possible grounds of error. The exigencies of modern appellate practice, with page limits on briefs and time limits on oral argument, dictate that counsel carefully scan the record and chose those arguments that, in his judgment, offer the greatest chance of success. Id., at 752-53. The selection process may require counsel to omit some arguable

issues in favor of others that are more likely to result in a reversal. Id.

Franklin concedes that appellate counsel's effectiveness is measured by the same standard as trial counsel's: whether his performance was deficient when judged by an objective standard and whether the appeal was prejudiced thereby. Strickland v. Washington, 466 U.S. 668 (1984). Prejudice results if there is a reasonable probability that, but for counsel's omitting a particular ground of error, the case would have been reversed.

Chapman testified at the evidentiary hearing that he had researched the record of Franklin's trial before writing the appellate brief (FEH II 8, 34-40). He rejected as a ground of error that the trial court improperly refused to give instructions on how to evaluate mitigating evidence because the issue had been addressed by the Court of Criminal Appeals before and decided against him (FEH II 10). He also considered the search and seizure issue but determined that, given the trial court's credibility choicer, the motion to suppress had been decided correctly (FEH II 11-12). He recognized that there was little hope of having the appellate court reject the trial court's credibility choices (FEH II 12). Chapman concluded both of these grounds were frivolous and that, if he had raised them in his brief, he would have weakened his credibility with the court (FEH II 10, 33).

It is clear that Chapman's judgment was correct. The Court of Criminal Appeals had consistently rejected the notion that the trial court must instruct the jury on how to evaluate mitigating evidence, see Quinones v. State, 592 S.W.2d 933, 947 (Tex. Crim. App.), cert. denied, 449 U.S. 839 (1980), and that court's rule is in accordance with Zant. Franklin has never suggested a new argument that might have been urged to persuade the Court of Criminal Appeals or this Court to overrule its past decisions. With respect to the motion to suppress, counsel also was reasonable in deciding not to raise the issue. The motion hinged on whether Franklin's consent was voluntary. Whether a person's

consent to search was voluntary is a question of fact to be determined from the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); Meeks v. State, 692 S.W.2d 504, 510 (Tex.Crim.App. 1985); Doescher v. State, 578 S.W.2d 385, 389 (Tex.Crim.App. 1978). Here, the trial court held an extensive hearing on Franklin's motion to suppress (SF I 80-285). There was conflicting testimony as to whether the police handled Franklin roughly, threatened him, or had their weapons drawn. The trial court clearly made credibility choices among the witnesses in making factual findings. Because the trier of fact is the sole judge of the credibility of the witnesses, Bellah v. State, 653 S.W.2d 795, 796 (Tex.Crim.App. 1983); Corley v. State, 582 S.W.2d 815, 819 (Tex.Crim.App.), cert. denied, 444 U.S. 919 (1979), counsel reasonably concluded that it would be unavailing to contend that the court erred in denying the motion to suppress, and the decision not to raise such a claim was clearly within the wide range of reasonably professional judgment. Cf. Wicker v. McCotter, 783 F.2d at 497 (raising only those issues counsel thought meritorious "represented the kind of strategy that able counsel pursue and appellate courts appreciate.) The courts below correctly applied the proper constitutional standard in rejecting Franklin's claim.[2]

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[2]Franklin also asserts that his consent followed an illegal arrest, which would have vitiated its voluntariness. Meeks v. State, 692 S.W.2d at 510. He contends that counsel should have made this argument on appeal. The record of the hearing on the motion to suppress reflects that this argument was not made to the trial court. Nor was the issue contained in the brief in support of the motion. Failure to raise such an objection in the trial court waives the claimed error for appellate review. Writt v. State, 541 S.W.2d 424, 426-27 (Tex. Crim. App. 1976). Counsel acted reasonably in not raising an issue that had not been preserved for appellate review.

VI

THE TRIAL COURT CORRECTLY EXCUSED VENIREPERSON SANTANA FOR CAUSE AND ITS DETERMINATION IS ENTITLED TO A PRESUMPTION OF CORRECTNESS BY THIS COURT.

Franklin contends that the trial court committed error when it granted the state's challenge for cause to venireperson Flavia Santana. During voir dire, the state challenged Ms. Santana because that she would hold the state to a stricter burden of proof than that imposed by law. On further questioning by defense counsel, Ms. Santana was rehabilitated and the court denied the state's challenge (SF IV 1191). The state then attempted to clarify Ms. Santana's position and the following exchange took place:

Questions by Mr. Harris (the prosecutor):

"Q. You seem to give me one answer and you give Mr. Cazier another answer. You are either going to follow the reasonable doubt or you are not?

"A. Okay. I want more than a reasonable doubt. Okay.

"Q. You want proof beyond any doubt whatsoever?

"A. Right.

"MR. HARRIS: We submit that juror is subject to challenge for cause.

"THE COURT: Okay. Mr. Cazier, did you have any final questions?

"MR. CAZIER: Yes.

Questions by Mr. Cazier (defense counsel):

"Q. Mrs. Santana, the problem is that the law in civilized countries knows no higher burden than beyond a reasonable doubt. Okay. An that burden is just about as high as an individual juror wants to make it. Nobody is going to define for you or tell you what is a reasonable doubt, okay. It is your decision to decide what is reasonable and to say whether or not you have doubt. Knowing that, I want to ask you again, if what you are really saying, I guess so simple that in view of the finality of the death penalty, that your construction of the term reasonable doubt would be very very strict, not that you would go beyond the law and require total certainty, but only that you will require a very strict interpretation of reasonable doubt. Would that be so?

"A. Let me ask you something first. Does that mean then that a reasonable doubt is different in each person's mind, like what is reasonable for me could not be for you or vice versa?

"Q. That's right. That's why we have twelve jurors instead of one.

"A. So your question was?

"Q. Isn't what you are really saying that your construction of the term reasonable doubt would be very very strict, not that it would be anything higher than beyond a reasonable doubt?

"A. Well, I will say then that my level or my whatever, for reasonable doubt is very nigh.

"MR. CAZIER: Thank you.

Questions by Mr. Harris:

"Q. Didn't you also say that your reasonable doubt would be different in a capital case than it would say in some other case?

"A. Yes, sir.

"Q. Because of the very nature of it, and didn't you say you would have to be one hundred percent convinced before you can find a person guilty of Capital Murder?

"A. I said that.

"MR. HARRIS: We renew our challenge for cause.

"THE COURT: Mrs. Santana, would you have to be absolutely certain?

"A. Yes.

"THE COURT: All right. Now, the Court is going to instruct the jury in every case, that a defendant's guilt must be proved by legal an competent evidence beyond a reasonable doubt. Would you hold the State to a more severe burden than that? Would you make them prove it to an absolute certainty?

"A. Well, it would -- they would have to prove to me beyond a doubt and up to one hundred percent.

"THE COURT: All right.

"A. In other words, my limit as far as doubt is very high. It is very close to one hundred percent. And I'm sorry if I am not making myself clear.

"THE COURT: You are making yourself clear.

All right. Does the State persist in their challenge for cause on this venireperson?

"MR. HARRIS: Yes.

(SF IV 1192-95).

Ms. Santana stated that because this was a capital punishment case, she would hold the state to the burden of proving its case, "up to one hundred percent," and that she would have to be "absolutely certain" before she could find a defendant guilty. To determine whether she was properly excludable, the trial court must inquire "whether the juror's views would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Wi[illegible], 469 U.S. 412, 424 (1985), quoting, Adams v. Texas, 448 U.S. 38, 45 (1980). The trial court is in a unique position to make this determination, which depends to a large degree on the venireperson's demeanor, credibility, and state of mind. Wainwright v. Witt, 469 U.S. at 428; Patton v. Yount, 467 U.S. 1025 (1984). A finding that a prospective juror could not comply with the prescribed duties is entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Wainwright v. Witt, 469 U.S. at 429. Here, the record clearly supports the court's determination that Ms. Santana could not follow the law with respect to the state's burden of proof. She would have required the state to convince her to an absolute certainty of Franklin's guilt. This is not, as Franklin contends, merely setting the standard of reasonable doubt at a high level. Instead, it changes the very nature of the burden the State would have to bear in order to obtain a conviction. The trial court granted the state's challenge for cause under the proper constitutional standards and the lower federal courts correctly accorded its finding a presumption of correctness. 28 U.S.C. § 2254(d); Wainwright v. Witt, 469 U.S. at 429. Franklin presents no claim meriting this Court's review.

VII.

THE TEXAS CAPITAL SENTENCING STATUTE ACTS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH SENTENCE AS REQUIRED BY THE CONSTITUTION.

Franklin attacks the constitutionality of the Texas capital punishment statute on the ground that it fails to properly narrow the class of persons eligible for the death sentence. In Texas, once a defendant has been found guilty of capital murder, the jury must answer special issues to determine punishment. First, the jury must decide whether the defendant acted deliberately and with the reasonable expectation that the death of the deceased or another would result. Second, the jury must determine whether there is a probability that the defendant would commit criminal acts of violence in the future that would constitute a continuing threat to society. Tex. Code Crim. Proc. Ann. art. 37.071(b)(1), (2) (Vernon Supp. 1981). If the jury answers both questions "Yes," the court must impose a death sentence. If the jury answers either question "No," or fails to answer either question, the court must sentence the defendant to life imprisonment. Id., art. 37.071(e).

Franklin acknowledges that this scheme for imposing capital punishment has been upheld by this Court. Jurek v. Texas, 428 U.S. 262 (1976). However, he contends that the Court was addressing only the second question posed to the jury. In Franklin's view, the constitutional defect is in the first special issue. Franklin notes that at the guilt-innocence stage of the trial, the jury must find that the defendant committed murder intentionally. Tex. Penal Code Ann. § 19.03(a) (Vernon 1974). Equating "intentionally" with "deliberately," used in the first special issue, Franklin asserts that article 37.071(b)(1) is meaningless. He elevates this to the level of a constitutional flaw by claiming that the statute does not narrow the sentencer's discretion to prevent the arbitrary imposition of the death penalty in violation of Furman v. Georgia, 408 U.S. 238 (1972).

Franklin's argument ignores the fact that the Texas Court of Criminal Appeals has expressly held that "deliberately" and "intentionally" are not linguistic equivalents. Heckert v. State, 612 S.W.2d 549, 552 (Tex.Crim.App. 1981). After deciding that the defendant acted intentionally, the jury must further determine whether that act was the result of a "thought process which embraces more than a will to engage in conduct and activates the intentional conduct." Fearance v. State, 620 S.W.2d 577, 584 (Tex.Crim.App. 1981) (footnote omitted).

It has already been held that the Texas statute defining capital murder sufficiently narrows the class of persons subject to the death penalty by requiring the finding of at least one aggravating circumstance. Barefoot v. Estelle, 463 U.S. 880 (1983); Jurek v. Texas, 428 U.S. at 268. The first special issue required by the sentencing statute further restricts the class by limiting the death penalty to only those capital murderers who acted deliberately. Heckert v. State, 612 S.W.2d at 552. Contrary to Franklin's assertions, article 37.071(b)(1) is not a nullity and does not render the statute unconstitutional.

Moreover, the constitutionality of the death penalty statute must be determined by looking at the entire scheme. Assuming, arguendo, that the first special issue of article 37.071 is a nullity, that does not invalidate the remainder of the law's provisions. As noted in part IV, supra at, a capital punishment statute must insure that the death penalty is not "wantonly" or "freakishly" imposed. Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring). This Court has already held that the Texas scheme passes this test by requiring the jury to must find at least one aggravating circumstance before finding a defendant guilty of capital murder. Tex. Penal Code Ann. § 19.03; Jurek v. Texas, 428 U.S. at 270-71. The special issues further narrow the instances in which a defendant can be sentenced to death. The jury must find that he will continue to commit violent acts in the future and be a continuing threat to society. In appropriate cases, the jury must also find that the

defendant's action was an inappropriate response to provocation by the victim. Tex. Penal Code Ann. 37.071(b)(2), (3). Finally, the Court of Criminal Appeals automatically reviews the conviction in every capital punishment case. As Jurek has already held, this scheme assures that the death penalty is not imposed in an unconstitutional manner. Even if the first special issue submitted to the jury does little to contribute to narrowing the class of defendants who can receive the death sentence, the entire statutory scheme is clearly constitutional. The lower courts' rejection of Franklin's claim was proper and further review by this Court is not warranted.

Nor is the granting of certiorari in Lowenfield v. Phelps, 817 F.2d 285 (5th Cir.), cert. granted, ___ U.S. ___, 107 S.Ct. 3227 (1987), significant in this case. One of the issues raised in Lowenfield is whether it is constitutionally permissible to impose the death penalty when the only aggravating factor duplicates a finding made at the guilt-innocence phase of trial. 817 F.2d at 288. Even if the Court determines that Lowenfield's death sentence was improper, it would not affect the sentence in this, or any other, death penalty case from Texas. This precise claim was recently rejected by the Fifth Circuit. In Thompson v. Lynaugh, 821 F.2d 1054, 1059-60 (5th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. ___ (1987), the court noted that becasue the second special issue, which does not duplicate any element of the offense of capital murder, performs a narrowing function, the existence of such an alternative narrowing issue renders the question of whether the first special issue duplicates an element of capital murder constitutionally irrelevant. As in Thompson, Franklin fails to demonstrate that the second special punishment issue by itself fails to adequately narrow the class of persons eligible for a death sentence or that the first special issue precludes the admission of evidence in mitigation of punishment. His assertion that "once the jury found petitioner guilty of capital murder it had no legal discretion except to sentence him to death" (Pet. at 31), simply and blatantly misstates the law.

VIII.

THE TRIAL COURT'S INSTRUCTIONS, WHICH COMBINED THE OFFENSES OF KIDNAPPING AND ROBBERY IN A SINGLE APPLICATION PARAGRAPH, DID NOT DEPRIVE FRANKLIN OF DUE PROCESS.

Franklin asserts that the trial court's charge to the jury was flawed by authorizing, in a single paragraph, a conviction if the jury found that Franklin committed murder in the course of committing and attempting to commit the offense of kidnapping or robbery. Such a charge, Franklin contends, allowed him to be convicted by less than a unanimous jury, because some jurors could have believed he committed murder in the course of committing kidnapping, while other jurors could have believed the underlying felony was robbery. Franklin notes that the verdict form stated only that Franklin was guilty of capital murder.

Review in federal habeas corpus of allegedly defective jury instructions is limited to whether the asserted impropriety "so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141 (1973).

The court below correctly found that the charge, even if erroneous, did not rise to the level of violating Franklin's rights. As the Fifth Circuit noted:

> The evidence supporting the commission of both felonies war crushing, unanswerable; the only question was, who did them? In these circumstances, the claim that some jurors may have thought Franklin only a kidnapper while others thought him only a robber lacks any substance whatever, despite its abstract plausibility. The jury faced only one real question: whoever did this thing did both robbery and kidnapping, but was it Franklin?

Franklin v. Lynaugh, 823 F.2d at 99.

Franklin's attempt to show a conflict between the lower court's opinion and Johnson v. Connecticut, 460 U.S. 73 (1983), is unavailing. Johnson involved a jury instruction that created a presumption of intent, an element of the offense, in violation of Sandstrom v. Montana, 442 U.S. 510 (1979). The charge here contained no such defect. Moreover, in Rose v. Clark, ___ U.S. ___, 106 S.Ct. 3101 (1986), this Court held that Sandstrom error is subject to harmless error analysis. To the extent that there

is conflict between this case and Johnson, the court below's opinion demonstrates that any error in the charge was harmless. Thus, Franklin's claim warrants no further review.

CONCLUSION

For the above reasons, the state prays that the application for stay of execution and petition for writ of certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

No. 87-5546

(4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,
Petitioner

v.

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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* Counsel of Record

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 25, 1987
CERTIORARI GRANTED OCTOBER 9, 1987

40 p

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IN THE 197TH JUDICIAL DISTRICT COURT
CAMERON COUNTY, TEXAS

No. 82-CR-159-C

TEXAS

v.

FRANKLIN

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
3/8/82	Commencement of jury selection
3/15/82	Commencement of guilt/innocence phase
3/19/82	Petitioner convicted of capital murder
3/20/82	Commencement of punishment phase
	Filed Defendant's Special Requested Charges on Punishment Nos. One through Five.
	Held charge conference
	Petitioner sentenced to death by trial court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-86-CA-608

FRANKLIN

v.

McCOTTER

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/9/86	Filed Application to Proceed In Forma Pauperis
	Filed Petition for Writ of Habeas Corpus
	Filed Application for Stay of Execution
4/14/86	Filed Respondent's Response to Petitioner's Request for Stay of Execution
4/30/86	Filed Respondent's Motion for Summary Judgment and Brief In Support
4/30/86	Held Evidentiary Hearing
6/6/86	Filed Magistrate's Recommendation that Petition for Writ of Habeas Corpus be denied and Stay of Execution vacated
6/16/86	Filed Petitioner's Objections to Magistrate's Recommendation
7/9/86	Filed Memorandum Opinion by United States District Judge
	Filed Order denying Petition for Writ of Habeas Corpus and vacating Stay of Execution

DATE	PROCEEDINGS
7/11/86	Filed Notice of Appeal
	Filed Application for Certificate of Probable Cause to Authorize Appeal and To Proceed on Appeal in Forma Pauperis
7/16/86	Filed Order Denying Application for Certificate of Probable Cause
	Filed Order Denying Application for Stay of Execution

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2538

FRANKLIN

v.

LYNAUGH

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8/1/86	Filed Application for Certificate of Probable Cause to Authorize Appeal and for Leave to Proceed on Appeal In Forma Pauperis
8/1/86	Filed Application for Stay of Execution
8/13/86	Filed Respondent-Appellee's Opposition to Petitioner's Motion for Stay of Execution and Certificate of Probable Cause
9/12/86	Filed Order Granting Certificate of Probable Cause and Stay Execution
10/29/86	Filed Petitioner-Appellant's Brief
1/7/87	Filed Respondent-Appellee's Brief
3/17/87	Oral Argument
7/30/87	Opinion Rendered
8/21/87	Mandate Issued
9/23/87	Filed Application for Stay of Execution Pending Disposition of Petition for Writ of Certiorari
9/28/87	Filed Order Denying Application for Stay of Execution Pending Disposition of Petition for Writ of Certiorari

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

No. 82-CR-159-C

STATE OF TEXAS

vs.

DONALD GENE FRANKLIN

INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The Grand Jury of Bexar County, State of Texas, duly organized, empaneled and sworn as such, at the January Term, A.D., 1980 of the 144th District Court of said County, in said Court, at said term, do present that in the County and State aforesaid, and anterior to the presentment of this indictment and on or about the 26TH day of JULY, A.D., 1975, DONALD GENE FRANKLIN did then and there knowingly and intentionally CAUSE THE DEATH OF AN INDIVIDUAL, NAMELY: MARY MARGARET MORAN, BY CUTTING AND STABBING THE SAID MARY MARGARET MORAN WITH A KNIFE, AND THE SAID DONALD GENE FRANKLIN DID THEN AND THERE INTENTIONALLY AND KNOWINGLY CAUSE THE DEATH OF MARY MARGARET MORAN IN THE COURSE OF COMMITTING AND ATTEMPTING TO COMMIT THE OFFENSE OF KIDNAPPING OF THE SAID MARY MARGARET MORAN;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present in and to said Court that

on or about the 26TH day of JULY, A.D., 1975, and anterior to the presentment of this indictment, in the County of Bexar and State of Texas, DONALD GENE FRANKLIN did then and there INTENTIONALLY AND KNOWINGLY CAUSE THE DEATH OF AN INDIVIDUAL, NAMELY: MARY MARGARET MORAN, BY CUTTING AND STABBING THE SAID MARY MARGARET MORAN WITH A KNIFE, AND THE SAID DONALD GENE FRANKLIN DID THEN AND THERE INTENTIONALLY AND KNOWINGLY CAUSE THE DEATH OF MARY MARGARET MORAN IN THE COURSE OF COMMITTING AND ATTEMPTING TO COMMIT THE OFFENSE OF ROBBERY OF THE SAID MARY MARGARET MORAN;

/s/ Patsy R. Monfrey
Assist Foreman of the Grand Jury

The Following for District Clerk's Use Only

Offense: Capital Murder

Name: Donald Gene Franklin

Address: 203 Blue Bonnet

Grand Jury No. 117633

File No. 80 CR 0328

Witness: State's Attorney

[Filed Feb. 26, 1982]

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. ONE

Filed: March 20, 1982

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DONALD GENE FRANKLIN, defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the Defendant's character or record, and any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is 'Yes'; and in the event such evidence does so cause you to have such a reasonable doubt, you should answer the Issue 'No.'"

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

The foregoing Defendant's Special Requested charge No. One is ————.

Judge Presiding

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. TWO

Filed: March 20, 1982

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DONALD GENE FRANKLIN, defendant in the above styled and numbered cause, and pursuant to Article 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that, in order to answer any of the Special Issues 'yes,' the Jury must believe unanimously, beyond a reasonable doubt, that the true answer to the Issue is 'Yes.' In order to answer any Issue 'No,' however, it is only necessary that ten of the jurors believe that the correct answer if 'No.' An answer of 'No' may be given to any of the Issues if:

"1) at least ten (10) jurors have a reasonable doubt as to whether or not the correct answer should be 'Yes'; or

"2) if at least ten (10) jurors find that mitigating factors against the imposition of the Death Penalty exist, either in regard to any aspect of the Defendant's character or record, or in regard to any of the circumstances of the commission of the offense which have been admitted in evidence before you; or

"3) if evidence of any such mitigating factors causes at least ten (10) jurors to have a reasonable doubt as to whether the true answer to the Issues is Yes.'"

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Two is ————.

Judge Presiding

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. THREE

Filed March 20, 1982

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DONALD GENE FRANKLIN, defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer any of the Special Issues 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bl.
San Antonio, Texas 78205
(512) 225-6151
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is ————.

Judge Presiding

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. FOUR

Filed March 20, 1982

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DONALD GENE FRANKLIN, defendant in the above styled and numbered cause, and pursuant to Artiole 36.15, Code of Professional Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer Special Issue No. One 'No' if you find any aspect of the Defendant's character or record as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
1010 Main Plaza Building
San Antonio, Texas 78205
(512) 225-6151
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Four is ————.

Judge Presiding

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. FIVE

Filed March 20, 1982

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DONALD GENE FRANKLIN, defendant in the above styled and numbered cause, and pursuant to Article 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer Special Issue No. 2 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
1010 Main Plaza Building
San Antonio, Texas 78205
(512) 225-6151
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Five is ————.

Judge Presiding

IN THE DISTRICT COURT OF
CAMERON COUNTY, TEXAS
197TH JUDICIAL DISTRICT

(Title Omitted in Printing)

CHARGE OF THE COURT ON PUNISHMENT

LADIES AND GENTLEMEN OF THE JURY:

You have found the Defendant, Donald Gene Franklin, guilty of Capital Murder. It now becomes necessary that you answer for the Court certain questions in order that the Court may assess the punishment as provided by law in this case.

Please remember all the instructions that the Court has previously given you and be guided by them.

I am submitting to you two issues to be answered by you. You are instructed that the State must prove each issue submitted beyond a reasonable doubt, and you will return a special verdict of "yes" or "no" on each issue submitted to you.

You may not answer any issue "yes" unless you agree unanimously upon such an answer.

You may not answer any issue "no" unless ten or more jurors agree upon such an answer. If the Jury returns an affirmative finding on each issue here submitted, the Court will sentence the Defendant to death. If the Jury returns a negative finding on any issue here submitted, the Court will sentence the Defendant to confinement in the Texas Department of Corrections for life.

After you have reached a verdict your Foreman will certify thereto by signing the appropriate form attached to this charge.

FILED:

/s/ Tom Rickhoff
Judge Presiding

IN THE DISTRICT COURT OF
CAMERON COUNTY, TEXAS
197TH JUDICIAL DISTRICT

(Title Omitted in Printing)

Filed March 20, 1982

ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, Donald Gene Franklin, that caused the death of Mary Margaret Moran, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Answer "Yes" or "No".

We, the Jury, answer: YES

ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society?

Answer "Yes" or "No".

We, the Jury, answer: YES

CERTIFICATE OF ANSWER

We, the Jury, return in open Court the above answers as our answers to the issues submitted to us and the same is our verdict in the case.

/s/ Robert L. Moon
Foreman

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

CHARGE CONFERENCE

[R.XIV—2953]

March 20, 1982

* * * *

(At the Bench out of the hearing of the jury)

THE COURT: All right. Are there—let me pass this to you and you tell me what objections you have to my Charge. I will keep the jury right here.

MR. HARRIS: State has no objection to the proposed Charge, nor do we have any requested additions.

MR. CAZIER: Your Honor has our request in writing. I understand it has made its ruling. We have no further objections to make

* * * *

IN THE DISTRICT COURT OF
CAMERON COUNTY, TEXAS
197TH JUDICIAL DISTRICT

(Title Omitted in Printing)

JUDGMENT OF CONVICTION

BE IT REMEMBERED that on the 8th day of March, 1982, this cause was called to trial and the State appeared by her Assistant Criminal District Attorney Bill Harris, Alan Battaglia and Mitch Weidenbach, and the defendant, Donald Gene Franklin appeared in person, his counsel by appointment, the Hon. Allan Cazier & Clarence Williams, also being present, and the defendant, having been duly arraigned, pleaded Not Guilty and both parties announced ready for trial; thereupon individual voir dire examinations of jury panel began and continued through March 13, 1982 until a jury of good and lawful persons, to wit: Robert Moon and eleven others, was duly selected, empaneled and sworn according to the law and charged by the Court on seperation; whereupon said cause was recessed until March 15, 1982.

THEREAFTER, on March 15, 1982 the indictment was read to the jury and the defendant entered his plea of Not Guilty thereto whereupon the State made the opening statements and proceeded to offer evidence through March 18, 1982, and rested.

WHEREUPON, the cause was recessed until March 18, 1982.

THEREAFTER, on March 18, 1982, defendant introduced evidence whereupon State offered no rebuttal evidence.

THEREAFTER, on March 19, 1982 the Court charged the jury as to the law applicable to said cause and argument of counsel for the State and the defendant was duly heard and concluded, and the jury retired in charge of the proper officer to consider their verdict, and afterward was brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received by the Court and is here now entered upon the Minutes of the Court, to wit:

"We, the Jury, find the Defendant, Donald Gene Franklin, Guilty of Capital Murder as charged in the Indictment.

/s/ Robert L. Moon
Foreman

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the defendant, Donald Gene Franklin, is guilty of the offense of Capital Murder as found by the jury, and that said offense was committed on July 25, 1975.

WHEREUPON the cause was recessed until March, 20, 1982.

THEREAFTER, on March 20, 1982, the hearing on punishment began and both the State and the defendant offered evidence and rested. WHEREUPON the Court charged the jury with additional instructions as to the law applicable to punishment in said cause and the Jury retired to consider its verdict as to defendant's punishment, and thereafter returned into open court in charge of the proper officer to return the following verdict, which was received by the Court and is herenow entered upon the Minutes of the Court, to wit:

ISSUE NO. 1.

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Donald Gene

Franklin, that caused the death of Mary Margaret Moran, was committed deliberately and with reasonable expectation that the death of the deceased or another would result?

Answer "Yes" or "No".

We, the Jury, answer: *Yes*

ISSUE NO. 2.

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society?

Answer "Yes" or "No".

We, the Jury, answer: *Yes*

CERTIFICATE OF ANSWER

"We, the Jury, return in open Court the above answers as our answers to the issues submitted to us and the same is our verdict in the case."

/s/ Robert L. Moon
Foreman

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant Donald Gene Franklin, is guilty of the offense of Capital Murder, as found by the Jury, and that he be punished, by reason of the answer made by the Jury to the Special Issues submitted, by *DEATH*.

SIGNED AND ORDERED ENTERED THIS 29 DAY OF March, 1982.

/s/ Tom Rickhoff
TOM RICKHOFF
Judge Presiding

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-86-CA-608

DONALD GENE FRANKLIN,
Petitioner

vs.

O.L. MCCOTTER, Director
Texas Department of Corrections,
Respondent

Filed July 9, 1986

MEMORANDUM OPINION

On this day came on to be considered petitioner's application for writ of habeas corpus, filed pursuant to 28 U.S.C. Section 2254. The application was referred to United States Magistrate Jamie C. Boyd to conduct an evidentiary hearing, to review state court records and to submit proposed findings of fact and conclusions of law and a recommendation for disposition to this Court. Magistrate Boyd concluded that petitioner was not entitled to relief, and that the application should be denied. Petitioner has timely objected to the report. This Court has conducted a de novo review by reading and considering the pleadings, the transcript of the evidentiary hearing, the state court records, and the applicable law. Having done so, it is the opinion of this Court that the recommendation should be adopted. Petitioner's claims A,

E, F, G, H, I, J, and K were adequately addressed by Magistrate Boyd, lack merit, and need not be discussed again.

In claim C, petitioner contends that the state trial court erred in failing to include in its jury charge, instructions regarding the jury's consideration of mitigating evidence. In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that a death penalty statute which does not permit the sentencer to consider mitigating factors, violates the Eighth and Fourteenth Amendments. The current Texas death penalty law, Article 37.071 of the Texas Code of Criminal Procedure, was upheld in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The Supreme Court, after noting that the Texas statute does not explicitly speak of mitigating circumstances, found that it did permit the jury to consider whatever evidence of mitigating circumstances the defense wishes to introduce. *Id.* at 272-73, 99 S.Ct. at 2956-57. Although the decision in *Jurek* preceded that in *Lockett*, it is clear that Article 37.071 complies with the requirement of *Lockett*. The Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances. *Zant v. Stephens*, 462 U.S. 862, 890, 103 S.Ct. 2733, 2750, 77 L.Ed.2d 235 (1983). The failure to so instruct the jury in this case was not error. *See, Esquivel v. McCotter*, 777 F.2d 956 (5th Cir. 1985). Since there was no error, petitioner's appellate counsel could not be ineffective for failing to raise that issue on appeal.

Petitioner also challenges the state trial court's order overruling his motion to suppress evidence. He sought to suppress various items of incriminating evidence seized from his home and car after he signed a consent-to-search form. The State contends and the Magistrate found that consideration of this issue by this Court is foreclosed by *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). In *Stone* the Supreme Court held that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. *Id.* at 494, 96 S.Ct. at 3052. The Fifth Circuit has interpreted "full and fair" consideration to include at least one evidentiary hearing in a trial court, and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute. *O'Berry v. Wainwright*, 546 F.2d 1204, 1213 (5th Cir. 1977). If a State provides the processes whereby a defendant can obtain full and fair litigation of a Fourth Amendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes. *Caver v. State of Alabama*, 577 F.2d 1188, 1192 (5th Cir. 1978). *See, Christian v. McCaskle*, 731 F.2d 1196, 1199 n.1 (5th Cir. 1984). In the absence of allegations that the processes are routinely or systematically applied in such a way as to prevent the actual litigation of Fourth Amendment claims, federal review is precluded. *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980). Petitioner has made no such contentions.

Twice the motion to suppress was heard and overruled. Prior to the first trial and then prior to the third trial, evidence was presented on the Fourth Amendment claim. Petitioner had every opportunity to cross-examine the State's witnesses, to challenge the State's exhibits, to present his evidence, and to argue his position. At the second hearing, the trial judge made several relevant inquiries of the witnesses and stated that he had read the cases pertinent to the suppression issue. In neither his first appeal (*Franklin v. State*, 606 S.W.2d 818 (Tex. Crim. App. 1978)) nor his third appeal (*Franklin v.*

State, 693 S.W.2d 420 (Tex. Crim. App. 1985)) did petitioner challenge the trial court's rulings, despite the opportunity to do so. Not until April 3, 1986, in his state application for writ of habeas corpus, did he present the Fourth Amendment claim to the Texas Court of Criminal Appeals, which denied it. The application had previously been denied by the trial court which held that the issue was not cognizable in a post-conviction habeas corpus proceeding. Petitioner asserts that ineffective assistance of his appellate counsel, an issue to be discussed below, in failing to raise the Fourth Amendment claim on direct appeal, precluded him from having an opportunity for full and fair litigation. This Court believes that, while this failure can be reviewed under the Sixth Amendment, it does not affect the application of *Stone v. Powell*. Having read the transcripts of the state court suppression hearings, this Court is firmly convinced that petitioner's motion hinged exclusively on disputed facts. Petitioner received full and fair litigation of his suppression claim in state trial court and had the availability of meaningful appellate review; federal habeas corpus cannot lie. *See, O'Berry v. Wainwright*, 546 F.2d at 1213.

In the final point to be addressed, petitioner contends he was denied the effective assistance of counsel on appeal because of counsel's failure to raise the Fourth Amendment issue. Until recently, whether *Stone v. Powell* precluded a Sixth Amendment claim such as this was undecided. *Lockhart v. McCotter*, 782 F.2d 1275, 1279 n.7 (5th Cir. 1986). In *Kimmelman v. Morrison*, 54 U.S.L.W. 4789, decided June 26, 1986, the United States Supreme Court held that federal habeas relief is available in such situations. Examination of the claim is, therefore, appropriate, since petitioner has a right to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. ——, ——, 105 S.Ct. 830, 836-37, 83 L.Ed.2d 821 (1985).

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established a two-pronged test for determining the effectiveness of counsel's performance. The defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. 104 S.Ct. at 2064. In determining whether counsel's performance was deficient, the relevant inquiry is whether counsel's representation fell below an objective standard of reasonableness according to prevailing professional standards. *Id.* at 2065. The reviewing court must give great deference to counsel's assistance, strongly presuming that counsel has exercised reasonable professional judgment. *Lockhart v. McCotter*, 782 F.2d at 1279.

At the evidentiary hearing before Magistrate Boyd, testimony was elicited that petitioner's appellate counsel was deficient in failing to appeal the suppression issue. Allen Cazier, trial counsel for petitioner at the third trial, testified that whether petitioner voluntarily consented to the search of his house and car was the "most significant issue" in terms of his defense. Cazier discussed the search issue with David Chapman, petitioner's appellate counsel, and encouraged him to raise it. Gerald Goldstein, a highly competent and respected criminal defense lawyer, testified that in a capital murder case, appellate counsel should raise arguable claims, which Goldstein believed, from reading petitioner's application for writ of habeas corpus, encompassed the Fourth Amendment claim here. David Weiner, an experienced criminal appeals lawyer, echoed this belief.

In *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), the Supreme Court held that a defendant has no constitutional right to compel appointed counsel to press non-frivolous points on appeal. The appellate advocate must be allowed to examine the record

with a view to selecting the most promising issues for review. *Id.* at 752, 103 S.Ct. at 3313.

> "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders* [*v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)]. *Id.* at 754, 103 S.Ct. at 3314.

This Court perceives no distinction between "arguable" and "colorable" claims. The belief that appellate counsel should raise all arguable claims dose not comport with *Jones. See, Evitts v. Lucey*, 105 S.Ct. at 835.

The testimony of Chapman establishes his reasons for choosing not to raise the suppression issue. He spent approximately ninety hours on the appeal. He researched and investigated the search and seizure issue, and took extensive notes from the record. Chapman believed that, for petitioner to prevail on appeal, the Texas Court of Criminal Appeals would have to find that the testimony of the police officers was false. He did not believe the appellate court would second-guess the credibility choices of the trial courts. As mentioned above, petitioner's motion presented credibility choices almost exclusively. As noted by Goldstein and Weiner, such situations make reversal more difficult because of the stringent standard for review. Chapman believed that the search question was not meritorious, and had virtually no chance of success. The testimony of Goldstein and Weiner to the contrary, which was based solely upon a reading of petitioner's application for writ of habeas corpus, and not upon a review of the state court briefs or transcripts, is unpersuasive. Chapman chose not to present the issue because it would diminish his credibility and detract from the grounds of error he believed did have merit. *See, Jones v. Barnes*, at 753, 103 S.Ct. at 3313. Chapman's research and investigation and his decision to raise only those points he believed had some plausible merit, represents the kind of strategy that able counsel pursue and appellate courts appreciate. *See, Wicken v. McCotter*, 783 F.2d 487, 497 (5th Cir. 1986). His representation of petitioner on appeal was not deficient.

While this finding is sufficient to justify denial of the ineffective assistance claim, the Court feels it appropriate, because this is a death penalty case, to also discuss its belief that petitioner suffered no prejudice from the failure to appeal the Fourth Amendment claim. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In this case, petitioner would have to establish a meritorious Fourth Amendment claim resulting in suppression of the incriminating evidence.

In his federal habeas corpus application, petitioner contends that he did not voluntarily consent to the search of his home and car. The application states that he was told by a police officer that if he did not consent, a search warrant would be obtained. Petitioner also clai ns he was under arrest at the time the consent was given, and that many police officers had their weapons drawn. He further contends that the arrest was illegal and tainted the subsequent consent. The allegation of a warrant threat is baseless, since petitioner, at the first suppression hearing, denied that the officer told him he would obtain a warrant if petitioner did not consent. (S.F.-I, p. 506). Such a statement could not, therefore, have been a factor in his decision to consent. As for the illegal arrest issue, it was never presented to the trial courts. While the motion to suppress was based on the volun-

tariness vel non of the consent, neither the brief nor the evidence was directed to the legality of the arrest and its effect on the consent. Because of this, there is little proof of the existence or lack of probable cause to arrest. The trial courts were never given the opportunity to rule on this precise issue, and it cannot, therefore, be considered now. *See, United States v. Hicks*, 524 F.2d 1001, 1004 (5th Cir. 1975), *cert. denied*, 424 U.S. 946 (1976). *Writt v. State*, 541 S.W.2d 424, 426 (Tex. Crim. App. 1976). In any event, the evidence on petitioner's arrest status was conflicting. Whether petitioner was under arrest and/or warned of his constitutional rights prior to consen. g were matters bearing on consent which the trial courts could consider. Some testimony indicated that the consent form was signed before he was arrested (S.F.-I, pgs. 459, 474, 476), while other evidence suggests he was arrested prior to consenting. (S.F.-I, p. 372; S.F.-III, p. 153). The trial courts were entitled to believe either scenario.

In determining whether consent was knowingly and voluntarily given, courts must analyze the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). *United States v. Davis*, 749 F.2d 292, 294 (5th Cir. 1985). At the first suppression hearing in December, 1975, petitioner was the only witness for the defense who was present at the scene. He testified he was jerked out of his door and pushed against a wall. (S.F.-I, p. 476). He also stated he was presented with a search warrant for his house which he was told to sign. (S.F.-I, p. 475). Because of the guns which were drawn and pointed at him, he feared for his safety and signed. (S.F.-I, p. 477). At the second suppression hearing in January, 1982, petitioner's stepfather, mother and common law wife testified that the officer's weapons were drawn and that petitioner was physically mistreated and told to sign the consent form. (S.F.-III, pgs. 90-92, 112-113, 125).

This Court believes, as did the state trial courts, that the defense version of the events lack credibility. Petitioner's previous rape conviction and his obvious keen personal interest in the outcome of the suppression hearing detract from the credibility. Not until the second hearing did petitioner's other eyewitnesses testify. Statements given by his stepfather and wife the day after the arrest do not mention that he was pulled out of the door into the yard full of police officers with drawn guns. (S.F.-III, pgs. 101, 129). The stepfather's statement indicates petitioner consented of his own choosing. (S.F.-III, p. 100). Several officers testified petitioner was not jerked or pulled from his house, and that guns were not drawn. (S.F.-III, pgs. 153-154, 183, 213, 215, 222-223, 242, 261, 266). He was asked to sign and told he did not have to sign. (S.F.-I, p. 395; S.F.-III, pgs. 153, 224). He was not forced, threatened or coerced into signing. (S.F.-III, pgs. 155, 182, 266). Petitioner never indicated he did not want to consent. (S.F.-I, pgs. 377, 416, 428-429). He read and understood the consent form, signed it and told the officers he had nothing to hide. (S.F.-I, pgs. 334, 373-374; S.F.-III, pgs. 118, 224). The motion to suppress was properly overruled, precluding the necessary showing that appellate counsel's failure to appeal the ruling prejudiced petitioner. His ineffective assistance of counsel claim is without merit and his application for writ of habeas corpus shall be denied.

SIGNED this 9th day of July, 1986.

/s/ H.F. Garcia
H.F. GARCIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Title Omitted in Printing)

JUDGMENT

In accordance with the Memorandum Opinion being entered contemporaneously herewith;

It is ORDERED that petitioner's application for writ of habeas corpus is DENIED. The stay of execution granted herein on April 11, 1986 is hereby VACATED.

SIGNED this 9th day of July, 1986.

/s/ H.F. Garcia
H.F. GARCIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Title Omitted in Printing)

ORDER

On this day came on to be considered petitioner's application for a stay of execution pending appeal. Contemporaneously herewith the Court has denied petitioner's application for a certificate of probable cause. For the reasons stated therein, the application for stay shall be denied.

It is, therefore, ORDERED that petitioner's application for a stay of execution is DENIED.

SIGNED this 15th day of July, 1986.

/s/ H.F. Garcia
H.F. GARCIA
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 86-2538, 86-2883

DONALD GENE FRANKLIN,
Petitioner-Appellant,

v.

JAMES A. LYNAUGH, Interim Director,
Texas Department of Corrections,
Respondent-Appellee.

July 30, 1987

Appeals from the United States District Court for
the Western District of Texas

Before GEE, RANDALL, and DAVIS, Circuit Judges.

PER CURIAM:

There is small occasion for us to rehearse the sickening facts of this murder, one in which an innocent victim who stepped into the wrong place at the wrong time was stabbed, raped and left to bleed to death for five days in the July sun of Texas. These are set forth at length in the various opinions on direct appeal, *e.g.*, 606 S.W.2d 818 (Tex. Crim. App. 1979). Nor need much be said on the law, it having developed and set against petitioner's contentions over the course of the twelve years

since his crime. We affirm the trial court's judgment denying habeas relief on the basis of that court's opinions, adding a few observations chiefly based on events occurring since that court ruled.

Of petitioner's points, the most nearly meritorious is that complaining of an improper reference to petitioner's post-arrest silence after he had received *Miranda* warnings. Since the handing down of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), comments by the prosecutor on the post-arrest silence of a defendant after the administration of *Miranda* warnings have been taboo. The Supreme Court has now held, however, that such a question as the prosecutor asked in this case does not require a grant of habeas relief where no *use* of the fact of petitioner's silence is permitted by the court. *Greer v. Miller*, —— U.S. ——, 107 S.Ct. 3102, 95 L.Ed.2d ——, 55 U.S.L.W. 5126 (1987). Here there was none; a sustained objection and an instruction to disregard followed hard on the improper question. It was never heard of again. *Greer* is on all fours; it controls.

The next most troubling was a statistics-based claim that the Texas murder statute is applied in a discriminatory way against blacks who murder whites. Petitioner's claims in this respect have been resolved against him by the Court's opinion in *McCleskey v. Kemp*, —— U.S. ——, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

Finally, we were concerned by petitioner's contention that the wording of the trial court's charge was such as to have permitted the jury to have convicted petitioner of capital murder for a killing committed in the course of a felony, when some jurors may have believed that the felony was robbery, while others thought it kidnapping.[1] While, on the words of the court's charge

[1] The portion of the charge in question authorized conviction on a finding of murder . . . in the course of committing and attempting to commit the offense of robbery *or* kidnapping (emphasis supplied).

standing alone, this may seem a realistic objection, when the record is consulted, it is not. On the evidence, there was little serious dispute that whoever attacked the victim both robbed and kidnapped her. Petitioner's defense disputed these matters only pro forma; his major claim was that he was not the perpetrator of the crime, that his indictment was the result of mistaken identity. The evidence supporting the commission of both felonies was crushing, unanswerable; the only question was, who did them? In these circumstances, the claim that some jurors may have thought Franklin only a kidnapper while others thought him only a robber lacks any substance whatever, despite its abstract plausibility. The jury faced only one real question: whoever did this thing did both robbery and kidnapping, but was it Franklin?

The jury found that it was. For whatever it adds, we agree. The stay of execution earlier granted is VACATED, and judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 86-2538 and 86-2883

(Title Omitted in Printing)

Appeals from the United States District Court for the Western District of Texas

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Filed September 28, 1987

Before GEE, RANDALL and DAVIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's application for stay of execution pending disposition of petition for writ of certiorari is DENIED.

IN THE SUPREME COURT
OF THE UNITED STATES

87-5546
(A-251)

FRANKLIN, DONALD G.

v.

LYNAUGH, DIR., TEXAS DOC

September 30, 1987

The application for stay of execution of sentence of death, presented to Justice White and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

SUPREME COURT OF THE UNITED STATES

No. 87-5546

DONALD GENE FRANKLIN,
Petitioner,

v.

JAMES A. LYNAUGH, Director,
Texas Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is order by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 9, 1987

(5)

NO. 87-5546

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did jury instructions given pursuant to article 37.071(b) of the Texas Code of Criminal Procedure deprive the jury of any procedure for considering and expressing the conclusion that the mitigating evidence called for a sentence less than death?

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CITATION TO OPINIONS BELOW

The opinion of the court of appeals is reported at 823 F.2d 98 (5th Cir. 1987), and is set out at pages 32-34 of the Joint Appendix (JA). The order and memorandum of decision by the United States District Court, Western District of Texas, are unreported. JA 21-30.

JURISDICTION

The opinion of the court of appeals was delivered on July 30, 1987. The petition for writ of certiorari was filed on September 25, 1987, and certiorari was granted on October 9, 1987. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States. It also involves section 19.03 of the Texas Penal Code and article 37.071 of the Texas Code of Criminal Procedure. The text of these provisions is set out in Appendix A.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Donald Gene Franklin was charged by bill of indictment which alleged that he committed the offense of capital murder by intentionally causing the death of Mary Margaret Moran in the course of robbery, kidnapping and aggravated rape, in violation of § 19.03(a)(2) of the Texas Penal Code. JA 5-6. Trial was before a jury which convicted Mr. Franklin of capital murder. At

the punishment hearing, the jury answered affirmatively both special issues submitted under article 37.071(b) of the Texas Code of Criminal Procedure. Accordingly Mr. Franklin was sentenced to death. JA 18-20. The conviction and sentence were affirmed on direct appeal. Franklin v. State, 693 S.W.2d 420 (Tex. Crim. App. 1985). Certiorari was denied. Franklin v. Texas, 106 S. Ct. 1238 (1986). The particular question presented in this brief was not raised on direct appeal.

Mr. Franklin then filed an application for writ of habeas corpus in the state trial court pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon 1977). The question presented in this brief was raised in the habeas application in two related grounds. First, Mr. Franklin contended that the trial court had erred in refusing his special requested instructions on mitigating evidence. Second, he contended that appellate counsel was ineffective for not raising this issue on direct appeal. The trial court recommended that relief be denied, and, on April 8. 1986, the Texas Court of Criminal Appeals denied relief on the application for writ of habeas corpus.

Mr. Franklin next raised this question in a petition for writ of habeas corpus filed in the United States District Court for the Western District of Texas, pursuant to 28 U.S.C. § 2254. Following an evidentiary hearing, the United States Magistrate recommended that the petition be denied. Mr. Franklin objected to the findings, conclusions and recommendation of the magistrate. After conducting a de novo review, the district

court adopted the magistrate's recommendation and denied the petition for writ of habeas corpus. JA 21-29.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed. Franklin v. Lynaugh, 823 F.2d 98 (5th Cir. 1987). JA 32-34. No motion for rehearing was filed.

B. Material Facts

Mary Margaret Moran was a staff nurse employed by the Audie Murphy Veteran's Hospital in San Antonio, Texas on July 25, 1975. [R.VIII--2046-2047][1] She was last seen on that night approximately 11:50 p.m., just before the end of her shift. [R.VIII--207J] Five days after her disappearance, on July 30, 1975, Ms. Moran was found alive in a field a short distance from the hospital. [R.X--2514, 2521] When found she was "very lucid and clear" and able to talk. [R.X--2641] At her request she was taken to the Methodist Hospital, where she died at approximately 6:30 a.m. on July 31, 1975. [R.X--2620, 2628, 2641] According to the state's medical witness, the cause of death was "shock, multiple stab wounds to the body, dehydration, and blood in the left chest cavity." [R.X--2628]

The evidence against Mr. Franklin was wholly circumstantial, consisting primarily of evidence which linked him to the car in which Ms. Moran was apparently abducted. Two eyewitnesses identified Mr. Franklin as the driver of the car. One saw him

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1. In this brief, "T.," followed by a volume and page number, refers to the transcript in the state trial court, which contains the documents, pleadings, motions and orders. "R," followed by a volume and page number refers to the statement of facts in the state trial court.

shortly after midnight in the hospital parking lot. He testified that he got a good look at the man, although he was depending on artificial illumination at a distance of 30 to 35 feet. [R.VIII--2120-2121] The second witness also saw him driving the car from the hospital parking lot. This witness, a security guard at the hospital, attempted unsuccessfully to stop the car. [R.VIII--2201-2203] At trial, Mr. Franklin's attorney asked this witness whether he had mistakenly identified another person as the driver of the vehicle in a previous trial. [R.VIII--2239-2241] Although the witness acknowledged making a mistake, he also appeared to blame the court reporter for misunderstanding his testimony. [R.VIII--2241-42]

The car that left the hospital lot that night was traced to Mr. Franklin. [R.IX--2006, 2213, 2261, 2293] At approximately 2:00 a.m., the police arrived at Mr. Franklin's house, found the car parked in front of his house, and observed blood in it. [R.IX--2262-64] Mr. Franklin was then arrested, and his car and house were searched. Blood, hair, and soil in the car revealed that it was probably the vehicle in which Ms. Moran was abducted and taken to the field. [R.X--2597-98, 2626, 2662, 2682-83] Clothing found inside Mr. Franklin's house had blood on it and appeared to be connected to the abduction of Ms. Moran. [R.X--2591-94, 2700, 2678-86] In a trash can outside his house, several items of Ms. Moran's personal property were found, [R.IX--2407], as well as a knife. [R.X--2687]

Mr. Franklin made no inculpatory statement. Further, there

was no unequivocal physical evidence linking Mr. Franklin personally and directly to the commission of this crime. His fingerprints were not found on any of Ms. Moran's personal items that were found in the trash can outside his house. Similarly, even though Ms. Moran was apparently assaulted initially when she was in her car at the hospital parking lot, [R.VIII--2208-12], Mr. Franklin's fingerprints were not found on or inside her car. [R.VIII--2112-13]

In the defense case during the guilt-innocence phase of the trial Mr. Franklin did not testify. He called two witnesses who testified about the medical treatment Ms. Moran received at the Methodist Hospital. [R.XI--2754, 2763] One of these witnesses, Harvey Cox, testified that he was the paramedic who attended Ms. Moran. [R.XI--2756] He had wanted to take Ms. Moran to the Bexar County Hospital because it was better staffed and equipped to handle an emergency. [R.XI--2757] He was overruled, however, by a doctor on the scene. [R.XI--2757][2]

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2. Mr. Franklin sought to prove as well that the crime had been committed by an acquaintance of his, Eugene "Smokey" Tealer. Evidence was offered to the trial court, outside the jury's presence, showing that Tealer had been employed at a nearby medical complex in July, 1975, [R.XI--2780], and that he had worked on July 25, 1975 from 3 p.m. until 11.30 p.m. [R.XI--2786] Tealer had been convicted of abducting, raping at knife point, and brutally beating, a Veteran's Administration Hospital nurse, prior to trial but after the killing of Ms. Moran, on February 18, 1976. [R.XI--2795-2801] Mr. Franklin also attempted to prove that Tealer bore a physical resemblance to him, [R.XI--2791], and that Franklin had loaned his vehicle to Tealer twice prior to July 25, 1975. [R.XI--2828]

The state objected to this proffered evidence, and with a limited exception, the objection was sustained "until such time as you have evidence which directly relates Eugene Tealer III to

Prior to commencement of the trial, the state abandoned the portion of the indictment alleging murder in the course of aggravated rape, electing to proceed instead on the theory that the murder was committed in the course of robbery and kidnapping. [R.III--688] The jury was instructed accordingly, and, it was also instructed on the lesser included offense of murder. [T.I--28-32] The court also charged the jury that this was "a case depending for conviction on circumstantial evidence." [T.I--33]

The state recognized in its summation that this was a circumstantial evidence case, [R.XII--2870], but further argued that it was well investigated and solid and that the evidence clearly showed Mr. Franklin guilty beyond a reasonable doubt. [R.XII--2902]

Mr. Franklin's attorneys, on the other hand, contended that there were two central issues in the case. [R.XII--2884] First, counsel argued that Mr. Franklin was mistakenly identified by the two eyewitnesses. [R.XII--2886, 2900] Second, and alternatively, counsel submitted that, assuming Mr. Franklin killed Ms. Moran, he lacked the specific intent to do so, and was guilty only of murder, not capital murder. [See T.I--32] In support of this latter theory, counsel reminded the jury of testimony and medical records indicating that Ms. Moran was

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this offense." [R.XI--2753] While the court would have admitted the testimony that the car had been loaned to Tealer twice previously, [R.XI--2853], defense counsel declined to offer this testimony, contending that it was "meaningless unless the jury is permitted to know who Eugene Tealer is and what his subsequent offenses have been and he was known to the police department on July 26, 1975." [R.XI--2854]

"seriously mismanaged in the hospital." [R.XII--2895-2899] The jury deliberated for almost five hours before finding Mr. Franklin guilty of capital murder. [T.I--13A]

At the punishment phase of the trial, the state called four police officers who testified Mr. Franklin had a bad reputation as a peaceful and law-abiding citizen. [R.XIII--2925-2934] Phylis Green testified that Mr. Franklin had raped her in 1974. [R.XIII--2935] And finally, the state proved a prior conviction for rape. [R.XIII--2946] The parties stipulated that Mr. Franklin had no record regarding disciplinary violations while incarcerated at the Texas Department of Corrections from 1971 until 1974 and from 1976 until 1980. [R.XIII--2952-2953]

Mr. Franklin submitted five special requested instructions seeking to inform the jury that it must consider relevant mitigating circumstances when determining the appropriate sentence. [T.I--47-51]; JA 7-12. Although timely submitted, the requests were not included in the charge. [R.XIII--2953] This procedure employed by Mr. Franklin preserved error under Texas law. See Tex. Code Crim. Proc. Ann. art. 36.15 (Vernon 1981). The one page charge on punishment actually submitted, and the accompanying special issues, did not mention the word "mitigation." [T.I--53-54]. Only special issues numbers one and two were submitted to the jury. Tex. Code Crim. Proc. Ann. art 37.071(b)(1) & (2)(Vernon 1981). After approximately five hours of deliberation, the jury answered both questions "yes," and the court sentenced Mr. Franklin to death. [T.I--13B-13C].

SUMMARY OF THE ARGUMENT

The sentencing jury was asked two statutory questions to determine whether Donald Franklin would live or die. These questions were concerned solely with whether the murder was committed deliberately and with the probability that Mr. Franklin would be dangerous in the future. Given the narrowness of the questions, the evidence before the jury pointed strongly to affirmative answers to both. In addition to the evidence which supported the affirmative answers and, therefore, a death sentence under Texas law, there was also evidence that weighed in favor of a sentence less than death. Because of the restrictive nature of the statutory questions, however, there was no procedure through which the jury could give effect to its view of the mitigating evidence. In an effort to remedy this problem, Mr. Franklin's attorneys requested jury instructions which would have explicated and broadened the facially narrow special issues to include consideration of the mitigating evidence offered in this case. These instructions were not given, and, as a result, the jury was precluded from considering relevant mitigating evidence, permitted to exclude that evidence from consideration, and prevented from giving independent weight to that evidence. This was inconsistent with the Eighth Amendment.

The constitutional defects in Mr. Franklin's sentencing proceeding did not arise because of unique misapplication of the Texas death penalty statute in his case. They occurred because the Texas statute lends itself to constitutionally defective

application respecting the jury's consideration of mitigating evidence. Although in Jurek v. Texas, 428 U.S. 262 (1976), the court was led to believe "that in considering whether to impose a death sentence the [Texas] jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it," Id. at 273, that promise has proven to be hollow. The Texas courts have consistently refused to require instructions that would assure the jury's consideration of mitigating evidence and that would provide a mechanism for the jury to impose a life sentence on the basis of mitigating evidence. Standing alone among the states in its refusal to assure that its capital sentencing scheme satisfies the mandate of Lockett v. Ohio, 438 U.S. 586 (1978), Texas abets the very Lockett error that occurred in Mr. Franklin's trial.

ARGUMENT

I.

MR. FRANKLIN'S SENTENCING VIOLATED LOCKETT V. OHIO BECAUSE, UNDER THE INSTRUCTIONS GIVEN, THE JURORS WERE DEPRIVED OF ANY PROCEDURE FOR CONSIDERING AND EXPRESSING THE CONCLUSION THAT THE MITIGATING EVIDENCE CALLED FOR A SENTENCE LESS THAN DEATH

A. Introduction

At the conclusion of Mr. Franklin's sentencing trial, the jury was instructed, in accord with the Texas capital sentencing statute, that his sentence would be based upon its answers to two questions. These questions, concerned with whether the homicide had been committed deliberately and with whether Mr. Franklin would likely be dangerous in the future, were to be answered "yes" or "no." [T.I--54]; JA 13-16.[3] The jury was given no direction concerning the evidence it was to consider in answering these questions. It was told only to answer the questions and was not given any other way to speak to Mr. Franklin's sentence. The jury was informed that if it answered both questions

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3. The questions were the following:

> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Donald Gene Franklin, that caused the death of Mary Margaret Moran, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society?

[T.I--54]; JA 13-16.

affirmatively, the court was required to sentence Mr. Franklin to death, but that if it answered only one of the questions affirmatively, the court was required to sentence him to life imprisonment. Id.

The evidence before the jury dramatically invited affirmative answers to the two "special issue" questions that were presented. The jury had already convicted Mr. Franklin of intentionally causing the death of Ms. Moran in the course of robbery and kidnapping. [T. I--38]; JA 19. That verdict logically entailed a "yes" answer to the question whether the homicide was "committed deliberately and with the reasonable expectation that the death of the deceased . . . would result." In the sentencing trial, the state presented evidence to show that Mr. Franklin had previously been convicted of rape, that he had committed another rape (prior to the murder of Ms. Moran) upon his release from prison, and that he had a reputation for violence in the community. This evidence clearly supported, if not compelled, the finding of "a probability" that Mr. Franklin "would commit criminal acts of violence that would constitute a continuing threat to society."

The jury also had before it evidence that weighed in favor of a sentence less than death. The state's evidence of guilt was wholly circumstantial, "which however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction, might convince a jury and a court that the ultimate penalty should not be exacted,

lest a mistake may have been made." King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). See Lockhart v. McCree, 106 S.Ct. 1758, 1769 (1986)(recognizing that "the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase"). In addition, the state stipulated to evidence that Mr. Franklin had a good prison record. As this Court has explained, "[i]t can hardly be disputed" that evidence that the defendant "ha[s] been a well behaved and well-adjusted prisoner" is "relevant evidence in mitigation of punishment." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). Unquestionably, "the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison." Id.

The problem which faced the jury in its deliberations upon Mr. Franklin's case under the instructions given was that even if the jurors concluded that the mitigating evidence called for a sentence less than death, they had no procedural mechanism through which to express that conclusion. The jury was not informed that the mitigating evidence might be considered as bearing upon the two special issues, to which it was not self-evidently relevant, nor that it might bear independently upon the choice of sentence. The jury was told only to answer the two questions yes or no. Neither through these verdicts nor outside of them could the jury voice its view of the effect, if any, that

it thought the mitigating evidence should have. As the Fifth Circuit has recently described this problem in another case,

> The jury was allowed to hear all evidence that might mitigate the culpability of [the petitioner's] deeds or his person. The jury could then consider (i.e. think about) the bearing of all of the evidence, aggravating and mitigating, upon the ultimate question of whether [petitioner] should be put to death. If, however, that consideration should lead the jury to decide against the death sentence, how is the decision given effect and incorporated into the verdict? No interrogatory asks about that most crucial decision. Having said that it was a deliberate murder and that [petitioner] will be a continuing threat, the jury can say no more.

Penry v. Lynaugh, ___F.2d___, No. 87-2466 (5th Cir. November 25, 1987), slip op. 674-75.

Recognizing this problem, in Mr. Franklin's case his lawyers tendered various instructions which sought to provide a procedural mechanism through which the jury could give effect to its view of the mitigating evidence. For, although the Texas Court of Criminal Appeals in Jurek said,[4] and this Court in Jurek therefore assumed,[5] that the Texas statute allowed room for consideration of any feature of the defendant or the crime which was put forward by the defense as mitigating, the unexplicated special issues provided no way in which that could be done in connection with Mr. Franklin's particular mitigating evidence. Counsel therefore drafted an array of instructions that sought to

4. Jurek v. State, 522 S.W.2d 934 (Tex. Crim. App. 1975).

5. Jurek v. Texas, 428 U.S. 262 (1976).

fit Mr. Franklin's mitigating evidence into every possible chink in the Texas statutory framework.

Thus, proposed instructions One and Two would have told the jury that it could consider the mitigating evidence as bearing upon the ultimate questions of fact framed by the special issues:

> You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the Defendant's character or record, and any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is 'Yes'; and in the event such evidence does so cause you to have such a reasonable doubt, you should answer the Issue 'No.'

[T.I --47]; JA 7. (Defendant's Special Requested Charge on Punishment No. One).

> An answer of 'No' may be given to any of the issues . . . if evidence of any such mitigating factors causes at least ten (10) jurors to have a reasonable doubt as to whether the true answer to the issues is 'Yes.'

[T.I--48]; JA 8. (Defendant's Special Requested Charge on Punishment No. Two)(in pertinent part).

Proposed instructions Two, Three, Four, and Five offered alternative ways in which the jury could express the view that Mr. Franklin's mitigating evidence independently called for a life sentence despite its lack of bearing upon the ultimate questions of fact framed by the special issues:

> An answer of 'No' may be given to any of the issues . . . if at least ten (10) jurors find that mitigating factors against the

> imposition of the Death Penalty exist, either in regard to any aspect of the Defendant's character or record, or in regard to any of the circumstances of the commission of the offense which have been admitted in evidence before you . . . .

[T.I--48]; JA 8. (Defendant's Special Requested Charge on Punishment No. Two)(in pertinent part).

> You are instructed that you may answer any of the Special Issues 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty.

[T. I--49]; JA 10. (Defendant's Special Requested Charge on Punishment No. Three).

> You are instructed that you may answer Special Issue No. One 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty.

[T.I--50]; JA 11. (Defendant's Special Requested Charge on Punishment No. Four).

> You are instructed that you may answer Special Issue No. Two 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty.

[T.I--51]; JA 12. (Defendant's Special Requested Charge on Punishment No. Five).

Counsel for Mr. Franklin thus attempted in every conceivable way to have the commands of Lockett v. Ohio honored within the Texas statutory framework, but he was rebuffed at every turn. As we will show, that was constitutional error.

B. The Lockett Error in Mr. Franklin's Case: His Jury Was Precluded From Considering Relevant Mitigating Evidence, Permitted To Exclude That Evidence From Consideration, And Prevented From Giving Independent Mitigating Weight To That Evidence

The rules derived from Lockett v. Ohio, 438 U.S 586 (1978), "are now well established . . . ." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). See also Hitchcock v. Dugger, 107 S.Ct. 1821, 1822 (1987). These rules require that the sentencer:

(a) "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," Lockett v. Ohio, 438 U.S. at 604 (emphasis in original):

(b) not be permitted to "exclud[e] such evidence from [his or her] consideration," Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)(emphasis supplied); and

(c) not be "prevent[ed] . . . from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation," Lockett v. Ohio, 438 U.S. at 605.

All of these rules were violated in Mr. Franklin's sentencing proceeding.

1. Residual Doubt About Mr. Franklin's Guilt

Viewed in its totality, the evidence presented in the guilt-innocence phase of Mr. Franklin's trial left some room for doubt about his guilt. As argued by the defense, this doubt fell into three categories. First, the defense argued that Mr. Franklin

was mistakenly accused of this crime, because he had been misidentified as the person driving his car at the time the victim was apparently being abducted in the car. [R.XII--2885-2890][6] The defense pointed out the lack of scientific evidence tying Mr. Franklin directly to the offense and urged that it was reasonable to believe that another person could have borrowed Mr. Franklin's car that night and been misidentified as Mr. Franklin. [R.XII--2891-2892] Second, the defense argued that the killing was not committed with the specific intent to kill necessary for the offense of capital murder in Texas. [R.XII--2893-2896][7] Third, the defense argued that Ms. Moran "may have been saved" had she been taken to an appropriate hospital after she was discovered. [R.XII--2899-2900]

The fact that Mr. Franklin's jury determined, notwithstanding defense counsel's argument, that he was guilty beyond a reasonable doubt "does not necessarily mean that no juror entertained any doubt whatsoever." Smith v. Balkcom, 660

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6. Two witnesses identified Mr. Franklin as the driver, but the defense argued that their identifications were suspect--one witness because he was thirty or more feet away, at night, and could give only a general description of the driver; the other, because he was motivated to maintain his identification of the driver as Mr. Franklin in order to justify his status as a "hero," even though in a previous trial he had identified Mr. Franklin's lawyer as the driver. See R.XII--2887-2888.

7. Mr. Franklin was charged with the form of capital murder that requires that the defendant "intentionally commit[] the murder" in the course of committing or attempting to commit one or more of five enumerated felonies. See Section 19.03(a)(2) of the Texas Penal Code (Vernon 1974).

F.2d 573, 580 (5th Cir. 1981), cert. denied, 459 U.S. 882 (1982)(emphasis in original). As the Fifth Circuit explained,

> There may be no reasonable doubt--doubt based upon reason--and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt--this absence of absolute certainty--can be real.

Id (emphasis in original). In the circumstances of Mr. Franklin's case, the doubt about guilt urged by the defense arguably created an "absence of absolute certainty."

This residuum of doubt could reasonably have persuaded some jurors that the death penalty was not the proper punishment in Mr. Franklin's case. They could have believed "that the ultimate penalty should not be exacted, lest a mistake . . . [be] made." King v. Strickland, 748 F.2d at 1464. If any jurors did harbor such a feeling, they reasonably could have believed as well that the court's sentencing instructions precluded their consideration of it.

The jury was expressly directed to answer only the two questions presented to it at the sentencing stage. It was provided no other way in which to express its view of whether death was the appropriate punishment for Mr. Franklin in light of all the evidence and inferences from the evidence.[8] Nor was the

8. In Cordova v. State, 733 S.W.2d 175, 190 n.3 (Tex. Crim. App. 1987), the trial court instructed the jury that it could consider "all of the evidence" in answering the special issues. The appellate court held that "this instruction sufficiently instructed the jury, albeit indirectly, that it could consider any mitigating evidence in determining the answers to the special issues". Even this "indirect[]" instruction was not contained in Mr. Franklin's sentencing instructions.

jury told--as defense counsel's proffered instructions would have--that upon the finding of any factor that called for a sentence less than death, it could properly answer either of the special issue questions "no." Without the proffered instruction, therefore, "a reasonable juror could have interpreted the instruction," Sandstrom v. Montana 442 U.S. 510, 514 (1979), to forbid the consideration of any factor which was not evidently relevant to one of the two statutory questions. Residual doubt about Mr. Franklin's guilt, as we demonstrate below, was not self-evidently relevant to either statutory question. Thus, the failure to instruct upon its relevance or to provide some other procedural mechanism through which the jury could consider residual doubts about guilt in its sentencing deliberations precluded consideration of that factor in the determination of Mr. Franklin's sentence.

The trial court's failure to instruct also permitted the jury to exclude from its consideration any residual doubt about Mr. Franklin's guilt. As a practical matter, there was no logical connection between the two special issue questions and doubt about Mr. Franklin's guilt. Accordingly, without an instruction like that proffered by Mr. Franklin's counsel, which explained that there could properly be a connection between any mitigating factor and the statutory questions,[9] there can be no

9. See e.g., Defendant's Special Requested Charge on Punishment No. One ("[y]ou are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty . . . may be sufficient to cause you to have a reasonable doubt as to whether . . . the true answer to any of

assurance that the jury considered, rather than excluded, any doubt about guilt from its sentencing deliberations.

Residual doubt about Mr. Franklin's guilt was not self-evidently relevant to either of the special issue questions. The first question asked whether the jury found "beyond a reasonable doubt" that the homicide "was committed deliberately and with the reasonable expectation that the death of the deceased . . . would result." [T.I--54]; JA 15. In convicting Mr. Franklin, the jury had already found beyond a reasonable doubt that he had "intentionally committ[ed] the murder" of Ms. Moran. In light of this finding, the jury could logically have concluded that it had already determined "beyond a reasonable doubt," as well, that the homicide "was committed deliberately and with the reasonable expectation that the death of the deceased . . . would result." Not surprisingly, this is exactly what the prosecution argued. [R.XIII--2976] Unless told that residual doubt about Mr. Franklin's specific intent could be considered in relation to this question, the jurors could logically have concluded that such doubt was irrelevant to the question. Any residual doubts they may have had about whether Mr. Franklin was involved at all in killing Ms. Moran, or whether his acts actually caused her death, were even less likely to be considered as relevant to this question.

Similarly, residual doubt about Mr. Franklin's guilt was not self-evidently relevant to the second special issue question. To

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the Special Issues is 'yes' . . . .")

prove "a probability that [Mr. Franklin] would commit criminal acts of violence that would constitute a continuing threat to society," [T.I--54]; JA 15 (Special Issue Number Two), the prosecution relied upon Mr. Franklin's history as a rapist prior to the homicide of Ms. Moran, as well as his reputation in the community for violence. Mr. Franklin was unable to raise any doubt about the accuracy of these facts. On the basis of these facts alone, the jury could have answered the second special issue question "yes," for it is commonly understood that a defendant's past conduct is indicative of his probable future behavior. See Barefoot v. Estelle, 463 U.S. 880, 902-03 (1983); Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). Thus, any doubt the jury might have entertained as to whether Mr. Franklin murdered Ms. Moran could have seemed irrelevant, to reasonable jurors, in their deliberations concerning his probable future dangerousness.

Accordingly, since Mr. Franklin's jury was not obliged to attend to any residual doubt about guilt--by logic or by direction of the court--there is an unacceptable risk that the jury excluded this factor from its sentencing deliberations. The jury may not have "listened" to this evidence, to which "Lockett requires the sentencer to listen." Eddings v. Oklahoma, 455 U.S. at 115 n.10.

2. Mr. Franklin's Prior Prison Record: Good Character Traits And No Probability of Future Dangerousness If Incarcerated

The evidence of Mr. Franklin's prior prison record presented

two distinct mitigating circumstances. As the Court explained in Skipper v. South Carolina, from such a record "the jury could have drawn favorable inferences . . . regarding petitioner's character and his probable future conduct if sentenced to life in prison." 106 S.Ct. at 1671 (emphasis supplied). An adjustment to prison life which demonstrates the ability to abide by established rules and to refrain from violence in an environment where violence is commonplace, reflects extremely positive traits of character. In order to live a well-behaved and well-adjusted life in prison, Mr. Franklin had to be able to exercise self-discipline, show respect for the rights and interests of others, and have the ability to work out disputes rationally and peacefully. In addition, such a record provided a powerful basis for concluding that Mr. Franklin would probably continue to behave this way if he were sentenced to life imprisonment. Since it is reasonable to conclude that "a defendant's past conduct [is] indicative of his probable future behavior," Skipper v. South Carolina, 106 S.Ct. at 1671, Mr. Franklin's prior prison record pointed to the conclusion that he would continue to behave in a non-violent, well-adjusted way if he were returned to prison.[10] Because the trial court failed to give the

10. Indeed, the evidence of Mr. Franklin's prison record provided much stronger support for this conclusion than the evidence before the Court in Skipper. Nearly half of Mr. Franklin's term of imprisonment was served after he was convicted of rape in 1970 and before he allegedly committed the murder of Ms. Moran in 1975. Accordingly, his good behavior during this time is not in the least suspect, as the concurring Justices in Skipper found Skipper's to be. See Id., 106 S. Ct. at 1676. (Powell, J., concurring, joined by Burger, C.J., and Rehnquist,

instructions proffered by Mr. Franklin's lawyer, however, neither of these mitigating factors was given constitutionally adequate consideration.

Unlike residual doubts about Mr. Franklin's guilt, the mitigating circumstances associated with Mr. Franklin's prior prison record could logically have been considered in the course of answering the special issue questions, because they were relevant to the second question, which focused on the probable future dangerousness of Mr. Franklin. So counsel argued. The prosecution forcefully urged that there was a probability of future dangerousness, based on Mr. Franklin's reputation in the community for violence, his prior rapes, and the murder of Ms. Moran. [R.XIII--2958-2959, 2977] Defense counsel countered that there would be no such probability if Mr. Franklin were sentenced to life imprisonment, since he had never been violent or demonstrated a potential for violence when incarcerated. [R.XIII--2963-2964] As framed by counsel, therefore, the real issue before Mr. Franklin's jury was what the jury could do with the stipulated evidence of Mr. Franklin's prison record.

In light of the evidence, the arguments of counsel, and the instructions given by the court, a juror could logically have concluded that the mitigating factors evinced by Mr. Franklin's prison record were very substantial. Mr. Franklin's behavior in

J.)("[g]ood behavior in those circumstances [while in jail awaiting trial or awaiting sentencing after conviction] would rarely be predictive as to the conduct of the prisoner after sentence has been imposed")(emphasis in original).

prison demonstrated that he had the strength of character to live a peaceful, productive life within the structured environment of a prison, and that, so long as he stayed in prison there was no probability that he would pose a threat to others. While there was a chance that he might be released, that chance was slim and did not offset the positive aspects of Mr. Franklin's character revealed by his prison record.[11] For these reasons, the jury could logically have concluded that Mr. Franklin's prison record weighed in favor of a life sentence.

Notwithstanding these conclusions, the jury could reasonably have interpreted the court's instructions as precluding any discretion to answer the second special issue question "no" on this basis. Since the question was whether there was "a probability" that Mr. Franklin "would commit criminal acts of violence that would constitute a continuing threat to society," [T.I--54]; JA 15 (emphasis supplied), the jury could reasonably have decided, on the basis of the evidence, that it had no choice but to answer this question "yes." The jury could not completely deny that Mr. Franklin's past criminal behavior presented "a probability" of "a threat" of future violent harm to others. On balance, the jury could reasonably have concluded that this

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11. At one point in his argument, the prosecutor tried to emphasize the possibility that Mr. Franklin could be released if he were sentenced to life in prison. See R. XIII--2980. Mr. Franklin's objection to this argument was sustained, however, and the jury was instructed to disregard it. Id. This sequence of events could well have reinforced the jury's logical conclusion that the possibility of Mr. Franklin's release was not so serious as to be taken into account.

"probability" of "a threat" of danger was heavily outweighed by Mr. Franklin's strength of character and ability to live peacefully in prison. However, the sole question the jury was asked about future dangerousness did not apparently allow it to balance these competing factors.

Given these findings, which Mr. Franklin's jury reasonably could have made, it is plain that if his jury had been asked, "Should Mr. Franklin be sentenced to death," the answer could have been "no." However, neither of the special issues submitted to the jury, nor any instructions accompanying the issues, gave the jury any discretion to return this answer. Because of the constraints of the narrow questions it was required to answer, the jury was forbidden to sentence Mr. Franklin to life on the basis of its consideration of his ability to live peacefully in prison.

For this reason, Mr. Franklin's sentencing proceeding violated the third rule of Lockett: his sentencer was prevented from "giving independent mitigating weight" to the evidence in mitigation. 438 U.S. at 605. Under the Ohio statute examined in Lockett, as in this aspect of Mr. Franklin's case, the sentencer was not wholly precluded from considering certain mitigating circumstances. Nonstatutory circumstances could be considered in determining whether any of the statutory mitigating circumstances were present. 438 U.S. at 608. However, if none of the statutory circumstances was established--even if nonstatutory circumstances were established--"the Ohio statute mandate[d] the

sentence of death." Id. The "consideration of . . . [nonstatutory mitigating circumstances] . . . would generally not be permitted, as such, to affect the sentencing decision." Id.

The Texas statute operated in the very same way in Mr. Franklin's case. It forced the sentencer to filter the mitigating factors associated with Mr. Franklin's prison record through the narrow statutory question concerned with future dangerousness. Once that question was answered "yes," the sentencer had no available mechanism through which to impose a life sentence even though it reasonably could have concluded that life was the appropriate sentence. The inability of Mr. Franklin's jury to effect a life sentence in these circumstances "prevent[ed] the sentencer . . . from giving independent mitigating weight" to nonstatutory mitigating circumstances. 438 U.S. at 605 (emphasis supplied).

II.

ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE HAS NOT BEEN CONSTRUED TO EFFECTUATE THE INDIVIDUAL CONSIDERATION OF MITIGATING FACTORS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS AS INTERPRETED IN LOCKETT V. OHIO

A. Introduction

The preceding section showed that, under the particular facts of this case, the sentencing jury was precluded from considering relevant mitigating factors, permitted to exclude these factors, and prevented from giving them independent weight. As a result, Mr. Franklin's death sentence is invalid. The judgment of the court of appeals should accordingly be reversed

and Mr. Franklin should be resentenced in a proceeding that comports with the requirements of Lockett. See Hitchcock v. Dugger, 107 S.Ct. 1821, 1824-1825 (1987).

This section demonstrates that the unconstitutionally restrictive consideration of the mitigating evidence in Mr. Franklin's case did not occur by chance or by the aberrant rulings of the trial judge. Instead, the Lockett errors committed here occurred because mitigating circumstances instructions such as the ones he requested are not required under the decisions of the Texas Court of Criminal Appeals. Without them, there is a risk that the Lockett errors in his case will be repeated in others. To demonstrate the prevalence of this risk, Mr. Franklin will examine the construction of article 37.071(b) by the Texas Court of Criminal Appeals since Jurek v. Texas, in the light of the post-Jurek decisions of this Court.

B. The Promise of Jurek v. Texas

In Jurek v. Texas, 428 U.S. 262 (1976) this Court considered several constitutional challenges to the validity of the Texas death penalty scheme. The Court recognized that article 37.071 did not explicitly speak of mitigating circumstances. The constitutionality of the Texas system, therefore, depended on whether the enumerated special issues "allow consideration of particularized mitigating factors." Id. at 272. To make this determination, the Court looked to the Texas court's construction of special issue number two in the only two cases it had then decided. Thus, in Jurek v. State, 522 S.W.2d 934 (Tex. Crim.

App. 1975), aff'd, 428 U.S. 262 (1976), the Court of Criminal Appeals had "indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." Id. at 273. It was this indication that the Texas court would broadly interpret the facially narrow second special issue which caused this Court to reject petitioner's Eighth and Fourteenth Amendment challenges. See Lockett v. Ohio, 438 U.S. 586, 607 (1978).

Since 1976 this Court has adhered to Jurek's analysis of Texas' capital sentencing scheme. See Pulley v. Harris, 465 U.S. 37, 51 (1984)(proportionality review not required); Barefoot v. Estelle, 463 U.S. 880, 906 (1983)(psychiatric testimony admissible at punishment phase). In a recent case, however, the United States Court of Appeals for the Fifth Circuit was faced with a challenge to the application of article 37.071 similar to that which Mr. Franklin now urges.

> We recognize that Jurek specifically upheld the Texas statute, as the state argues. Developing Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty. There is a question whether the Texas scheme permits the full range of discretion which the Supreme Court may require. Perhaps, it is time to reconsider Jurek in light of that developing law.

Penry v. Lynaugh, ___F.2d___, No. 87-2466 (5th Cir. November 25, 1987), slip op. 680. Specifically, two post-Jurek developments are significant.

First, as noted above, at the time Jurek was decided, this Court had only two reported cases upon which to base its critical conclusion that the Texas Court of Criminal Appeals had construed the second special issue "so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." Jurek v. Texas, 428 U.S. at 273. Since 1976, the Texas Court of Criminal Appeals has construed all three special questions in scores of cases. An examination of these cases demonstrates that the Texas court has retreated from its earlier commitment to broadly interpret article 37.071 to "allow consideration of particularized mitigating factors." Id. at 272.

Second, a number of post-Jurek decisions of this Court, beginning with Lockett v. Ohio, 438 U.S. 586 (1978), and concluding with Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), are inconsistent with the Texas Court of Criminal Appeals' post-Jurek treatment of mitigating evidence.

C. Since 1976 the Texas Court Has Consistently Narrowed, Not Broadened, An Already Facially Narrow Statute

1. Texas refuses to require supplementation of the special issues by instructions to consider mitigating circumstances

Jurek v. State, 522 S.W.2d 934 (Tex. Crim. App. 1975), aff'd, 428 U.S. 262 (1976), was the first capital case under article 37.071 to reach the Texas Court of Criminal Appeals. Id. at 936 n.1. There the court held that the special issues provided for by article 37.071(b) "channel the jury's consideration on punishment and effectively insure against the arbitrary and wanton imposition of the death penalty." Id. at

939. Accordingly, the court rejected the notion that a specific list of factors in addition to the special issues is required to be submitted to the jury:

> The fact that an exhaustive and precise list of factors is not specifically included does not indicate that the jury is without adequate guidelines. We are inclined to believe that the factors which determine whether the sentence of death is an appropriate penalty in a particular case are too complex to be compressed within the limits of a simple formula. However, there are some factors which are readily apparent and are viable factors for the jury's consideration. In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of this prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however, inflamed, could withstand.

Id. at 939-940.

Since that time, the Texas court has consistently reiterated that the purpose of the special issues is to provide the guidance to the sentencer that is required by the Constitution. E.g., Green v. State, 682 S.W.2d 271, 286 (Tex. Crim. App. 1984), cert. denied, 470 U.S. 1034 (1985); Evans v. State, 601 S.W.2d 943, 946 (Tex. Crim. App. 1980); Brown v. State, 554 S.W.2d 677, 679 (Tex. Crim. App. 1977). A majority of the court has further held that, consistently with Jurek v. State, no further guidance on

mitigation is required beyond that provided by the special issues.

Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App.), cert. denied, 449 U.S. 893 (1980), appears to be the first post-Jurek decision on this issue. There Quinones requested an instruction that "[e]vidence presented in mitigation of the penalty may be considered should the jury desire, in determining the answer to any of the special issues." Id. at 947. The trial court denied this request and submitted the special issues without explanation. The Court of Criminal Appeals affirmed.

> The question then is whether the language of the special issue is so complex that an explanatory charge is necessary to keep the jury from disregarding the evidence properly before it. In King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977), cert. denied, 434 U.S. 1088, 98 S.Ct. 1284, 55 L.Ed.2d 793 (1978), this Court held that the questions in Art. 37.071 used terms of common understanding which required no special definition. The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required.

Id. Accord, Richardson v. State, __S.W.2d__, No. 68, 934 (Tex. Crim. App. October 28, 1987), slip op. 38; Cordova v. State, 733 S.W 2d 175, 190 (Tex. Crim. App. 1987); Demouchette v. State, 731 S.W.2d 75, 80 (Tex. Crim. App. 1986); Clark v. State, 717 S.W.2d 910, 920-921 (Tex. Crim. App. 1986), cert. denied, 107 S.Ct. 2202 (1987); Anderson v. State, 701 S.W.2d 868, 873 (Tex. Crim. App. 1985), cert. denied, 107 S.Ct. 239 (1986); Penry v. State, 691 S.W.2d 636, 654 (Tex. Crim. App. 1985), cert. denied, 106 S. Ct.

834 (1986); Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984), cert. denied, 106 S.Ct. 190 (1985); Williams v. State, 622 S.W.2d 116, 121 (Tex. Crim. App. 1981), cert. denied, 455 U.S. 1008 (1982). As noted in Cordova v. State, 733 S.W.2d at 189, "Under our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues." The court further acknowledged that, in Texas, jurors are advised on mitigating evidence "indirectly." Id. at 190 n.3.

Undeniably, the Texas procedure which relies wholly upon the special issues to provide the constitutionally necessary guidance for consideration of mitigating evidence is exceedingly narrow. See Lockett v. Ohio, 438 U.S. 586, 607 (1978). The extent of its narrowness is well illustrated in Johnson v. State, 691 S.W.2d 619 (Tex. Crim. App. 1984), cert. denied, 106 S.Ct. 184 (1985). There the appellate court found no error in the refusal to instruct the jury on its option to recommend life imprisonment, since there was no provision in the special issues for such a charge:

> This clearly is not the law. The jury is supposed to consider all the evidence and answer the special issues based upon that evidence. The judge then assesses the punishment, depending upon the answers, at death or life. The jury charge in this case correctly instructed the jury on the law. Appellant did not request any additional charges. The special issues adequately guide the jurors in weighing the mitigating and aggravating circumstances presented by the evidence.

Id. at 626. See also Adams v. State, 577 S.W.2d 717, 729 (Tex.

Crim. App. 1979), rev'd on other grounds, 448 U.S. 38 (1980) (special issues do not comprehend leniency inquiry).

Three judges on the court of criminal appeals, however, have taken issue with the conclusion that the narrow special issues are sufficient by themselves to guide the jury on mitigating evidence:

> If we are insure the constitutionality of 37.071, we must not only give lip service to broadly interpreting it; we must also apply it as interpreted. This could easily be effected by requiring a jury instruction on mitigating evidence. It is folly for the Court to first acknowledge a capital murder defendant's right to produce mitigating evidence, give the jury no guidance in its use, then presume these 12 laypersons know the holdings of Lockett and Eddings until the defendant affirmatively proves the contrary.

Stewart v. State, 686 S.W.2d at 125-26 (Clinton, J. joined by Teague and Miller, J.J., dissenting)(emphasis in original); see also Johnson v. State, 691 S.W.2d at 627 (Clinton, joined by Miller, J., concurring).

The specific concern of the minority was that certain evidence by its very nature "is at once damning and mitigating." Id. at 125. As examples, the dissenters listed mental disease and childhood deprivation. Although such factors might be mitigating in that they may lead the jury to exercise mercy, at the same time they may establish a probability of future dangerousness, thus compelling an affirmative answer to the second issue. According to these judges, the narrow Texas procedure does not permit the jury to accord independent weight to all relevant mitigating circumstances, in violation of Lockett

v. Ohio Id. at 125-126. To insure that Texas procedure complies with Lockett, the dissenters would require an instruction on mitigating evidence.

2. Special issue number one does not properly include consideration of mitigating circumstances since an affirmative answer logically follows anytime a person is convicted of intentional murder

Special issue number one is submitted in every capital case in Texas. Here it asked:

> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Donald Gene Franklin, that caused the death of Mary Margaret Moran, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

[T.I--54]; JA 15. This Court declined in Jurek to decide whether the first issue properly included consideration of mitigating factors and instead deferred to the Texas Court of Criminal Appeals. Jurek v. Texas, 428 U.S. 272 n.7. It is now clear that the Texas court has not construed this issue to include consideration of mitigating circumstances.

Initially it is important to note that two key components of this issue--"beyond a reasonable doubt" and "deliberately"--are not required to be defined under Texas law. See Marquez v. State, 725 S.W.2d 217, 241 (Tex. Crim. App. 1987)(proof beyond a reasonable doubt); Russell v. State, 665 S.W.2d 771, 780 (Tex. Crim. App. 1983)(deliberately).[12] In Jurek, this Court pointed out that the Texas court had "yet to precisely define" certain

12. Neither was defined in Mr. Franklin's case.

terminology in issue number two. Jurek v. Texas, 428 U.S. at 273. Implicit in this is the recognition that such definitions would be useful in evaluating an issue's capacity for guidance. That no such definitions have yet been given is one indication of the lack of guidance in the Texas system. C.f. Godfrey v. Georgia, 446 U.S. 420, 429 (1980)(jury given no guidance concerning statutory terms); see Williams v. State, 674 S.W.2d 315, 322 (Tex. Crim. App. 1984)(while first issue is confusing, and definition would have been helpful, it is not essential).

Additionally, special issue number one simply does not focus the jury's attention upon any mitigating factor.[13] By the time the punishment phase of the trial is reached, a rational juror could only answer this question yes.

Since "intentionally" is the exclusive culpable mental state for capital murder under Tex. Penal Code Ann. § 19.03(a)(2), every person convicted of capital murder in the course of robbery

13. Although the Jurek Court envisioned a specific mitigating function that could be served by special issue number three, no similar attempt was made regarding issue number one. Jurek v. Texas, 428 U.S. at 272 n.7. The Texas Court of Criminal Appeals has specifically rejected the claim that this issue affirmatively precludes consideration of mitigating circumstances. See Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984), cert. denied, 106 S. Ct. 190 (1985). On the other hand, the court has not attempted to explain how the issue leads the sentencer to consider mitigating circumstances. To the contrary, the court appears satisfied that sufficient mitigation guidance can come from the other special issues. Thus, in Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App.), cert. denied, 449 U.S. 893 (1980), the court refused to require an "explanatory charge" on mitigation because "[t]he jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence." Id. at 947 (emphasis supplied).

or kidnapping has necessarily been determined to have acted intentionally. As noted, "deliberately" is typically not defined in Texas. "Intentionally" is defined, however, as required by Tex. Penal Code Ann. § 6.03(a)(Vernon 1974). Accordingly, the jury in Mr. Franklin's case was instructed that: "A person acts 'intentionally,' or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." [R.I--30] Considering both the failure to define "deliberately," and the definition given for "intentionally," it cannot fairly be argued that the jury could have perceived a difference between these two words. If it perceived no difference, then a "yes" answer to special issue number one was automatic once the jury found, as it did, that the defendant had acted intentionally. Clearly, a question which must be automatically answered against the accused provides no guidance for the jury's exercise of sentencing discretion. See Stewart v. Texas, 106 S. Ct. 190, 193 n.4 (Marshall, J., dissenting from denial of certiorari).

Justice Blackmun has captured the meaningless of this special issue in his dissenting opinion in Barefoot v. Estelle, 463 U.S. 880 (1983):

> It appears that every person convicted of capital murder in Texas will satisfy the other requirement relevant to Barefoot's sentence, that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result . . ."

> because a capital murder conviction requires a finding that the defendant intentionally or knowingly cause[d] the death of an individual.

Id. at 917 n.1.

Although the Texas Court of Criminal Appeals has "repeatedly and resoundingly rejected" this contention, e.g, Marquez v. State, 725 S.W.2d 217, 244 (Tex. Crim. App. 1987), its decisions are not entirely consistent. In King v. State, 631 S.W.2d 486, 502 (Tex. Crim. App.), cert. denied, 459 U.S. 928 (1982), the court noted the "tremendous amount of confusion and dissension among the bench and bar over the meaning and import of the word "deliberately." In Blansett v. State, 556 S.W.2d 322, 327 n.6 (Tex. Crim. App. 1977), the court recognized the obvious: "[A]" jury having found that defendant intentionally committed a capital murder to be consistent would have to find that the act was deliberately done." And, very recently, in Gardner v. State, 730 S.W.2d 675, 680 (Tex. Crim. App. 1987), the court noted that "absent applicability of the law of parties, it will be the extraordinary case in which evidence sufficient to prove an 'intentional' murder for purposes of § 19.03(a)(2) will not also serve in whole or in part to establish that the killing was 'committed deliberately and with the reasonable expectation that . . . death . . . would result.'" See Penry v. Lynaugh, __F.2d __, No. 87-2466 (5th Cir. November 25, 1987), slip op. 680 (answer "likely to be yes").

The best indication that this issue is meaningless is that in twelve years of reported decisions, not a single one has been reversed on appeal for insufficient evidence on special issue number one. This fact gives substance to Justice Blackmun's observation in Barefoot that this special issue is in fact not an issue at all once a defendant has been convicted of capital murder. To state it another way, article 37.071(b)(1), and the construction of it adopted by the Texas Court of Criminal Appeals, is such as to render it useless in directing the jury's consideration of mitigating evidence. Accordingly, it cannot fairly be contended that special issue number one properly includes consideration of mitigating factors.

3. Special issue number three has limited potential for mitigation and then only when submitted

Tex. Code Crim. Proc. Ann. art. 37.071(b)(3)(Vernon Supp. 1987) provides for a third special issue in some cases:

> if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Unlike question number one, question number three has been expressly construed to permit the jury to consider "particularized mitigating circumstances." Evans v. State, 601 S.W.2d 943, 946 (Tex. Crim. App. 1980). See Esquivel v. McCotter, 777 F.2d 956, 957 (5th Cir. 1985). Two things are important about this issue. First, due to its very nature, it has a limited potential for consideration of mitiating circumstances. See Horne v. State, 607 S.W.2d 556, 558 n.3 (Tex. Crim. App. 1980)("may be

true that jury . . . will more than likely answer this issue against the accused"). Second, special issue number three, is only submitted where there is evidence raising provocation. E.g., Marquez v. State, supra, 725 S.W.2d at 224; Hernandez v. State, 643 S.W.2d 397, 401 (Tex. Crim. App. 1982).[14] Practically speaking the third special issue "rarely enters into the decision of the jury." Penry v. Lynaugh, ___F.2d___, No. 87-2466 (5th Cir. November 25, 1987), slip op. 679.

4. Special issue number two is insufficient to require consideration of all mitigating circumstances

In the present case the jury was instructed:

> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society?

[T.I--54]; JA 15.

In Jurek the Court noted that the "Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as 'criminal acts of violence' or 'continuing threat to society.'" Jurek v. Texas, 428 U.S. at 273. In the intervening eleven years, it still has not done so. Indeed it has held that these terms, as well as "probability," need not be defined for the jury. See King v. State, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977). Nor is it necessary to define "proof beyond a reasonable

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14. There was no such evidence in Mr. Franklin's case, and special issue number three was not submitted.

doubt." See Marquez v. State, 725 S.W.2d at 241.[15]

Apart from the lack of definitions, there are other problems with the construction given special question number two by the Texas Court of Criminal Appeals.

This Court has made it clear that the sentencer must consider both the character and record of the individual offender and the circumstances of the offense. See Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also Booth v. Maryland, 107 S.Ct. 2529, 2535 (1987)(jury's "constitutionally required task" is to determine sentence in light of background and record of the accused and the circumstances of the crime). By their very nature, issues number one and three are concerned only with historical facts involving the offense itself. See Horne v. State, 607 S.W.2d 556, 563 (Tex. Crim. 1980)(Roberts, J., concurring). The answer to these issues will depend, almost invariably, solely on the circumstances of the offense. Only the second issue then, has even the potential for focusing on the "particularized circumstances of the . . . individual offender." Yet the Texas court has many times held that the circumstances of the instant offense itself can alone be sufficient to sustain an affirmative finding to issue number two. E.g., Green v. State, 682 S.W.2d 271, 289 (Tex. Crim. App. 1984), cert. denied, 470 U.S. 1034 (1985); McMahon v. State, 582 S.W.2d 786, 792 (Tex. Crim. App. 1978), cert. denied sub. nom. McCormick v. Texas, 444

15. None of these terms were defined in Mr. Franklin's case.

U.S. 919 (1979); Duffy v. State, 567 S.W.2d 197, 208 (Tex. Crim. App. 1978), cert. denied, 439 U.S. 991 (1978).

Thus, Texas appears to have come full circle since Jurek v. State, 522 S.W.2d at 939-940, where it noted that special issue number two is broad enough to comprehend an inquiry into various individualized circumstances of the capital defendant, including his age, criminal record and mental condition. This construction by the court, that the circumstances of the offense alone can support a "yes" answer to issue number two, amounts to a recognition of the extremely limited role of that issue in guiding and focusing a juror's consideration on the particularized circumstances of the individual offender. In Barefoot v. Estelle, 463 U.S. 880, 896 (1983), the Court recognized that future dangerousness is a constitutionally acceptable criterion for imposing the death penalty. Mr. Franklin does not dispute that it is an appropriate factor among the many that should be considered. However, it cannot constitutionally be the sole criterion. Yet, that is the law of Texas.

5. The Constitutional promise of the Texas statute has been exceedingly diminished by the Texas court's application of the statute since Jurek

This Court in Jurek expressly relied on the Texas state court's interpretation of article 37.071 in holding that that statute provided the guidance required by the Constitution. As recognized two years later in Lockett v. Ohio, 438 U.S. 586 (1978), article 37.071

> survived the petitioner's Eighth and Fourteenth Amendment attack because three justices concluded that the Court of Criminal Appeals had broadly interpreted the second question--despite its facial narrowness--so as to permit the sentencer to consider "whatever mitigating circumstances" the defendant might be able to show.

Id. at 607. On July 2, 1976, decisions were also announced upholding the facial validity of the death penalty statutes of Georgia and Florida. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). In Lockett, 438 U.S. 586 (1978), the Court remarked that "[n]one of [these] statutes . . . clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." Id. at 607 (emphasis supplied).

Since 1976 this Court has re-examined both the Georgia and Florida statutes in light of subsequent construction by those states' courts. As a result, death sentences imposed upon prisoners in both states have been invalidated, notwithstanding the Court's earlier decisions in Gregg and Proffitt. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Godfrey v. Georgia, 446 U.S. 420 (1980). A similar examination of article 37.071, in light of subsequent construction by the Texas Court of Criminal Appeals, demonstrates that that court is interpreting the statute much more narrowly than was apparent in 1976. The result of this narrow interpretation is that consideration of mitigating evidence is being unconstitutionally restricted, as it was in Mr. Franklin's case.

D. Developing Law in This Court Has Made Plain That the Unfulfilled Promise of the Texas Statute Is Constitutionally Intolerable

1. Texas has unconstitutionally narrowed the jury's discretion to decline to impose the death sentence

On the one hand, a state must narrow the class of persons subject to execution by giving the sentencer specific and detailed guidance. However, "[i]n contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 107 S. Ct. 1756, 1772-1773 (1987)(emphasis in original). There is a "tension . . . between [these] two central principles of our Eighth Amendment jurisprudence." California v. Brown, 107 S. Ct. 837, 841 (1987)(O'Connor, J., concurring). Clearly, this tension can be constitutionally resolved by the proper jury instructions which give the jury discretion to decline to impose the death penalty. Just as clearly, however, no resolution is achieved in Texas by an unexplicated submission of the special issues which too narrowly restrict the discretion required by the Constitution.

This is well illustrated by Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979), rev'd on other grounds, 448 U.S. 38 (1980). There the defendant sought an instruction which would have permitted the jury to extend him leniency, if it felt he deserved it, even though the special issues were answered affirmatively. Id. at 729. The court of criminal appeals

rejected this contention, concluding that the Supreme "Court clearly did not intend that the authority be given such broad discretion to decide whether a given defendant ought to receive the death penalty." Id. (emphasis supplied). The court went on to find that "[t]he three issues specified in Art. 37.071, supra, provide this direction and limit the discretion of the jury so as to prevent the arbitrary or capricious imposition of the death penalty." Id. at 730 (emphasis supplied). The Adams court was correct in holding that the special issues limit the jury's discretion. This is the vice rather than the virtue of the Texas system, however. As recognized in McCleskey, the Constitution restricts the "State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 107 S. Ct. at 1773. Article 37.071, which limits discretion to evidence relevant only to the narrow special issues, is irreconcilable with McCleskey.

2. By restricting the jury to "certain enumerated" special issues, Texas limits consideration of nonstatutory mitigating circumstances

In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the advisory jury was given a list of statutory mitigating circumstances which it was allowed to consider. The sentencing judge later announced that he was "mandated to apply the facts to certain enumerated 'aggravating' and 'mitigating' circumstances." Id. at 1824 (emphasis in original). This Court reversed the death sentence, holding that "it could not be clearer that the advisory jury was

instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper . . . Eddings . . . [and] Lockett . . . ." Id.

In a case like Mr. Franklin's, there is no perceptible difference between the Texas procedure, in which the jury is directed to answer "certain enumerated" statutory questions, and the procedure employed in Hitchcock. If there is a difference, it is only that the Texas system is even more restrictive, because in Florida the list of potentially mitigating circumstances is more comprehensive than are the Texas special issues. See Hitchcock v. Dugger, 107 S.Ct. at 1823 n.3.

3. As applied in a case like Mr. Franklin's, Article 37.071(b) is indistinguishable from the Ohio statute invalidated in Lockett

Section 2929-04(B) of the Ohio Revised Code, discussed in Lockett v. Ohio, 438 U.S. 586 (1978), required imposition of the death penalty if at least one aggravating factor was found, unless at least one of the three following mitigating circumstances was established by a preponderance of the evidence:

> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of

insanity.

Id. at 607.

The Ohio Supreme Court had upheld its statute "because the mitigating circumstances in Ohio's statute are 'liberally construed in favor of the accused.'" Id. at 608. Specifically the sentencer "may consider factors such as the age and criminal record of the defendant in determining whether any of the mitigating circumstances is established." Id. at 608 (emphasis supplied).

This Court upheld the Texas statute in Jurek despite its facial narrowness, because the Texas Court of Criminal Appeals--like the Ohio Supreme Court--had indicated it would construe special issue number two to allow the defendant to bring before the jury "whatever mitigating circumstances he could show." Jurek v. Texas, 428 U.S. 262, 273 (1976). This indication came from Jurek v. State, 522 S.W.2d at 939-940 in which the Texas court had stated:

> In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."

Jurek v. Texas, 428 U.S. at 272-273 (emphasis supplied).

In Ohio, however, a similar procedure was condemned, for

> even under the Ohio court's construction of the statute, only the three factors specified in the statute can be considered in mitigation of the defendant's sentence.

Lockett v. Ohio, 438 U.S. 586, 608 (1978). Mitigating factors beyond the statutory factors "would generally not be permitted, as such, to affect the sentencing decision." Id.

When the Court approved the Texas statute, this vice was not apparent even though, as in Ohio, the jury was asked to consider only a narrow range of questions. There was the promise from the Texas Court of Criminal Appeals that the jury could consider "what ever mitigating circumstances [the defendant] could show," and there was no indication, as there was in Ohio, that the jury's consideration of these circumstances "would generally not be permitted, as such, to affect the sentencing decision." Subsequent history has shown, however, that this promise was illusory. The Texas statute, like the Ohio statute, now clearly forbids a sentencing decision to be based upon mitigating evidence unrelated to the statutory questions.

Sumner v. Shuman, 107 S.Ct. 2716 (1987) articulates most graphically the constitutional fault in such a sentencing scheme. There the Court considered Nevada's capital procedure where death was mandatory upon a finding of two "indicators": conviction for murder while in prison under a statute which yielded a sentence of life imprisonment without parole. Id. at 2724. Finding that these two indicators "do not provide an adequate basis on which to determine whether the death sentence is the appropriate

sanction in any particular case," the death sentence was reversed.

> Not only do the two elements that are incorporated in the mandatory statute serve as incomplete indicators of the circumstances surrounding the murder and of the defendant's criminal record, but they say nothing of the "[c]ircumstances such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct.

Id. at 2725. Although the Texas statute clearly permits the jury to consider more potentially mitigating evidence than did the Nevada statute, its special issues are also "incomplete indicators," which are silent on the circumstances of the offender such as youth, intoxication, or mental condition. Accordingly, the narrow Texas statute provides a constitutionally inadequate basis to determine the appropriateness of the death sentence.

4. Lockett requires the sentencer to listen; Texas does not

In Jurek, the Texas Court of Criminal Appeals construed article 37.071 permissively. Recognizing that it did not mandate consideration of mitigating factors on its face, the court nonetheless approved the statute because "the jury could consider" various factors, such as the age, record and mental condition of the defendant. Jurek v. State, 522 S.W.2d 1934, 939, 940 (Tex. Crim. App. 1975), aff'd, 428 U.S. 262 (1976)(emphasis supplied). A decade later, Texas remains content with a wholly permissive system. In Anderson v. State, 701

S.W.2d 868, 873-874 (Tex. Crim. App. 1985), cert. denied, 107 S.Ct. 239 (1986), the court refused to require additional instructions because article 37.071 "allows the jury to consider mitigating evidence."

This Court, in Jurek v. Texas, 428 U.S. 262 (1976), also noted the permissive nature of article 37.071. After saying that "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors," the court quoted the language from Jurek v. State in which the Texas court indicated that, in answering special issue number two, "the jury could consider" factors including the defendant's age, criminal record and mental condition. Id. 273; see also Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 n.6 (1977).

Unlike the Texas court, however, this Court has since made it clear that consideration of mitigating circumstances is not merely permissive. Thus, in Eddings v. Oklahoma, 455 U.S. 104 (1982) this Court reversed a death sentence after determining that the sentencer had refused to consider certain relevant mitigating evidence.

> The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> * * *
>
> On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating

circumstances.

Id. at 115, 117 (emphasis supplied). As the Court further pointed out: "Lockett requires the sentencer to listen." Id. at 115 n.10. See also McCleskey v. Kemp, 107 S.Ct. 1756, 1773 (1987)("the Constitution limits a state's ability to narrow a sentencer's discretion to consider relevant evidence"); California v. Brown, 107 S.Ct. 837, 839 (1987)(consideration is "constitutionally indispensible"); Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986)(sentencer may not refuse to consider); Spaziano v. Florida, 468 U.S. 447, 459 (1984)("constitutional obligation" to evaluate unique circumstances of defendant).

5. Merely permitting the presentation of all relevant mitigating evidence does not insure that the jury will consider this evidence

In concluding that the Texas procedure did not violate the Eighth and Fourteenth Amendments to the United States Constitution, the Jurek Court wrote:

> By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has insured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function.

Jurek v. Texas, 428 U.S. 262, 276 (1976). But subsequent decisions of the Court establish that a capital sentencer's consitutional obligation to consider mitigating evidence is not satisfied simply because the defense is able to bring all mitigating circumstances before it. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982). In

both cases the petitioners were allowed to introduce evidence in mitigation, apparently without limitation. Hitchcock v. Dugger, 107 S. Ct. at 1824; Eddings v. Oklahoma, 455 U.S. at 107-108. Despite their unlimited freedom to introduce evidence, this Court reversed both sentences of death because the sentencers had refused to consider the evidence of mitigating circumstances presented. Hitchcock v. Dugger, 107 S. Ct. 1824; Eddings v. Oklahoma, 455 U.S. at 113.

There is a good reason for this rule. It is by now axiomatic that, because the penalty of death is qualitatively different from all others, there is a heightened need for reliability in sentencing procedures. E.g., Caldwell v. Mississippi, 105 S.Ct. 2633, 2645 (1985); Zant v. Stephens, 462 U.S. 862, 884-885 (1983); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). As Justice O'Connor noted in Eddings, a capital sentencing determination should not leave it to speculation

> whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them to be insufficient to offset the aggravating circumstances . . . .
>
> Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings v. Oklahoma, 455 U.S. 104, 119 (O'Connor, J., concurring).

Even if Texas law permits the unfettered introduction of relevant mitigating circumstances, it is wholly speculative whether the jury actually considers these circumstances under the

Texas special issue procedure. Only jury instructions connecting mitigating circumstances with the special issues submitted, such as those proposed by Mr. Franklin and refused by his trial judge, can assure that mitigating evidence is given its constitutionally indispensable place in the capital sentencing process. A proper jury instruction "fosters the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" California v. Brown, 107 S.Ct. 837, 840 (1987); C.f. California v. Brown, 107 S.Ct. at 841 (O'Connor, J., concurring)(instructions taken as a whole "must clearly inform the jury that they are to consider any relevant mitigating evidence").

III.

A SURVEY OF THE VARIOUS CAPITAL SENTENCING SYSTEMS IN THE UNITED STATES REVEALS THAT NO OTHER STATE HAS PROVIDED SUCH INADEQUATE PROCEDURAL SAFEGUARDS TO INSURE COMPLIANCE WITH LOCKETT V. OHIO.

A. Practice in Other Jurisdictions: The Weight of Current Legislative Judgment

Presently 33 states besides Texas have statutes providing for jury participation in capital sentencing. The New York statute has been declared unconstitutional for failure to provide for consideration of individualized circumstances of the offender. People v. Smith, 479 N.Y.S.2d 706, 725 (N.Y. 1984), cert. denied, 105 S. Ct. 1226 (1985). Of the other 32 states, 31 have explicit statutory provisions regarding mitigating evidence. See Ala. Code § 13A-5-46-e (1982); Ark. Stat. Ann. § 41-1304 (1987); Cal. Penal Code § 190.3 (Supp. 1987); Colo. Rev. Stat. §

16-11-103(2)(a)(1986); Conn. Gen. Stat. Ann. § 53a-46a (g)(West 1985); Del. Code Ann. tit. 11, § 4209(c)(4)(1979); Fla. Stat. Ann. § 921.141(2) (West 1985); Ga. Code Ann. § 17-10-30(b)(1984); Ill. Ann. Stat. Ch. 38 § 9-1(c)(Smith-Hurd Supp. 1987); Ind. Code Ann. § 35-50-2-9(c)(Burns Supp. 1987); Ky. Rev. Stat. Ann. § 532.025(2)(Baldwin 1981); La. Code Crim. Proc. Ann. art. 905.3 (West Supp. 1987); Md. Ann. Code art. 27, § 413 (Supp. 1987); Mass. Gen. Laws Ann. Ch. 279, § 68 (West Supp. 1987); Miss. Code Ann. § 99-19-101 (2) (Supp. 1987); Mo. Ann. Stat. § 565.032.1 (Vernon Supp. 1987); Nev. Rev. Stat. § 175.554 (1986); N.H. Rev. Stat. Ann. § 630:5 II(b)(1986); N.J. Stat. Ann. § 2C:11-3 (West. Supp. 1987); N.M. Stat. Ann. § 31-20A-2(1987); N.C. Gen. Stat. § 15A-2000(b)(1983); Ohio Rev. Code Ann. § 2929.03(D)(2)(Baldwin 1982); Or. Rev. Stat. § 163.150(2) (b)(1985); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(Purdon 1982); S.C. Code Ann. § 16-3-20(C)(Law. Co-op. Supp. 1986); S.D. Codified Laws Ann. § 23A-27A-1 (Supp. 1987); Tenn. Code Ann. § 39-2-203(e) (1982); Utah Code Ann. § 76-3-207(2)(Supp. 1987); Va. Code § 19.2-264.4 (1983); Wash. Rev. Code Ann. § 10.95.060(4) (Supp. 1987); Wyo. Stat. § 6-2-102(d)(1977); see also Model Penal Code § 210.6 (proposed official draft 1962). Examination of case law from the remaining state, Oklahoma, demonstrates that juries there are specifically instructed on mitigating circumstances. See Van Woundenberg v. State, 720 P.2d 328, 336 (Okla. Crim. App. 1986).

Recently, Oregon adopted a special issue procedure virtually identical to article 37.071. See Or. Rev. Stat. § 163.150

(1985). Significantly, however, the Oregon jury is to be specifically instructed to consider any mitigating circumstances offered in evidence, including, but not limited to, the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed. . . ." Or. Rev. Stat. § 163.150(2)(b) (1985). That is, Oregon has statutorily mandated explicit instruction on the mitigating circumstances which are supposed to be discerned by Texas juries without instruction. Cf. Jurek v. State, 522 S.W.2d at 939-940.

The mere fact that other states have chosen different capital sentencing schemes does not prove that the Texas procedure is unconstitutional. See Spaziano v. Florida, 468 U.S. 447, 464 (1984). On the other hand, this Court frequently conducts comparative analyses to determine the purport of current legislative judgment. E.g., Enmund v. Florida, 458 U.S. 782, 793 (1982); Beck v. Alabama, 447 U.S. 625, 637 (1980); Coker v. Georgia, 433 U.S. 584, 596 (1977); Woodson v. North Carolina, 428 U.S. 280, 293 (1976). An examination of that judgment nationwide leads to the conclusion that no where but in Texas is consideration of mitigating evidence left so completely to happenstance and disjoined from any operative effect on the death sentencing decision as it was under Texas practice in Mr. Franklin's case.

B. Of the Lower Federal Courts Only the Fifth Circuit Has Approved Schemes Similar to Texas

The United States Court of Appeals for the Fifth Circuit has expressly held that the Texas death penalty scheme is not unconstitutional for failure to require an instruction on the use of mitigating evidence. Esquivel v. McCotter, 777 F.2d 956, 958 (5th Cir. 1985); O'Bryan v. Estelle, 714 F.2d 365, 385 (5th Cir. 1983).[16]

No other lower federal court which has considered this question has approved instructions on mitigation which are as spartan as those found in Texas.

The Eleventh Circuit requires "that the trial judge 'clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death.'" Moore v. Kemp, 809 F.2d 702, 731 (11th Cir. 1987); Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir. 1986). Texas requires no instruction on the option to recommend against death, see Johnson v. State, 691 S.W.2d 619, 626 (Tex. Crim. App. 1984), cert. denied, 106 S.Ct. 184 (1985), any more than it requires instruction on mitigating circumstances.

In Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986) the court of appeals rejected a challenge to the Utah statute, noting that the jury instructions "emphasized that mitigating factors

16. Very recently, a panel of the Fifth Circuit addressed a claim similar to the one made by Mr. Franklin. Although the court rejected that claim because it believed itself bound by Jurek v. Texas and previous Fifth Circuit opinions, it went on to discuss the developing law in this Court and to suggest that "[p]erhaps, it is time to reconsider Jurek in light of that developing law." Penry v. Lynaugh, ___ F.2d ___, No. 87-2466 (5th Cir. November 25, 1987), slip op. 680.

should be considered and that they could prove decisive in the balancing process." Id. at 1265. No such instruction is given in Texas.

And in Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), the court of appeals upheld the constitutionality of the Virginia death penalty statute after recognizing that the jury charge, which instructed the jury on five occasions to consider mitigating evidence, left the definite impression that the jury was to take into account all mitigating evidence. See also Rook v. Rice, 783 F.2d 401, 405 (4th Cir. 1986)(jury instructed to weigh aggravating and mitigating circumstances).

C. That Specific Standards Are Not Required For Balancing Aggravating and Mitigating Circumstances Does Not Mean That No Guidance At All Is Required

Texas relied strongly on Zant v. Stephens, 462 U.S. 862 (1983), in the courts below in opposition to Mr. Franklin's claim. Careful examination of Zant, however, reveals that it does not diminish Mr. Franklin's contention.

In Zant the question was whether invalidation by the Georgia Supreme Court of one of three statutory aggravating circumstances found by the jury rendered the defendant's death sentence impermissible. Id. at 864. In the context of this issue, concerned solely with aggravating factors, the Court commented that Jurek v. Texas "makes clear that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." Id. 875 n.13. Mr. Franklin has no quarrel whatsoever with that proposition. See McCleskey v. Kemp,

107 S.Ct. 1756, 1778 n.37 (1987). His position, also is simply that, even though specific balancing standards are not required, a capital sentencing jury must nonetheless be instructed to consider all mitigating evidence presented, and must be given some way to express its consideration of mitigating evidence in its verdict. This is certainly true where the state's method of submitting the question of a capital sentence to the jury risks--as the special issue used in Texas does--that mitigating evidence will otherwise be wholly disregarded. In Zant, the jury was explicitly authorized to consider "all facts and circumstances presented in extinuation [sic], mitigation . . . [and] any mitigating circumstances. . . authorized by law." Zant v. Stephens, 456 U.S. 410, 411 n.1 (1982). Mr. Franklin's jury was given no such change, and was precluded from considering relevant mitigating circumstances because of the narrowness of the two special issues presented to it. If Lockett, Eddings, Skipper and Hitchcock are to apply in Texas as elsewhere, life cannot constitutionally be taken under such a sentencing procedure.

CONCLUSION

For these various reasons, the decision below should be reversed.

Respectfully submitted:

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By _____
MARK STEVENS

Attorneys for Petitioner

NO. 87-5546

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner

v.

JAMES A. LYNAUGH, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

BRIEF FOR PETITIONER
ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

I, Mark Stevens, a member of the bar of this Court, hereby certify that on this ay of December, 1987, one copy of the Petition for Writ of tiorari in the above-entitled case was mailed, first class, postage prepaid to William Zapalac, Assistant Attorney General for the Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, counsel for the respondent herein. I further certify that all parties required to be served have been served.

_____
MARK STEVENS

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES OF THE STATE OF TEXAS

Tex. Penal Code Ann. § 19.03 (Vernon 1974):

(a) A person commits an offense if he commits murder as defined under § 19.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981):

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the

deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

No. 87-6548

(6)

Supreme Court, U.S.
FILED
JAN 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

DONALD GENE FRANKLIN,
Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS
DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Do this special issues submitted at the punishment phase of a capital murder trial pursuant to article 37.071(b) of the Texas Code of Criminal Procedure adequately provide for jury consideration of any aspect of the defendant's character or record or any circumstances of the offense that the defendant proffers as a basis for a sentence less than death?

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No. 87-5546

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent[1] herein, by and

---

[1]For clarity, Respondent in this Court, James A. Lynaugh, Director, Texas Department of Corrections, will be referred to as "the state," the real party in interest. Petitioner, Donald Gene Franklin, will be referred to as "Franklin."

through his attorney, the Attorney General of Texas, and files this Brief.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was delivered on July 30, 1987, and is reproduced in the Joint Appendix[2] at 32-34. *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987). The federal district court's memorandum opinion, order of dismissal, and final judgment are reproduced at JA 21-31. *Franklin v. Lynaugh*, No. SA-86-CA-608 (W.D.Tex. 1986) (unpublished).

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1987. No rehearing was sought. The petition for writ of certiorari was timely filed on September 25, 1987. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Franklin bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution, and Section 19.03 of the Texas Penal Code and Article 37.071 of the Texas Code of Criminal Procedure.

[2]The state adopts the system of citation employed by Franklin. Thus, "JA" refers to the Joint Appendix; "T." followed by a volume and page number refers to the transcript in the state trial court, which contains the documents, pleadings, motions, and orders; and "R." followed by a volume and page number refers to the statement of facts in the state trial court.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful and valid custody of Franklin pursuant to a judgment and sentence of the 197th Judicial District Court of Cameron County, Texas, in Cause No. 82-CR-159-C, styled *The State of Texas v. Donald Gene Franklin*.[3] Franklin was indicted by the Bexar County Grand Jury for the capital offense of murder of Mary Margaret Moran, committed in the course of committing or attempting to commit robbery or kidnapping, to which he entered a plea of not guilty. The trial was moved on a change of venue to Cameron County, where Franklin was tried by a jury and found guilty of capital murder. After hearing evidence relating to punishment, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987). Accordingly, on March 20, 1982, Franklin was sentenced to death by lethal injection. Venue and jurisdiction then were transferred to the 289th District Court of Bexar County, Texas.

The Texas Court of Criminal Appeals affirmed Franklin's third conviction and sentence on June 26, 1985. *Franklin v. State*, 693 S.W.2d 420 (Tex. Crim. App. 1985). This Court denied a petition for writ of certiorari on February 24, 1986. *Franklin v. Texas*, ___ U.S. ___, 106 S.Ct. 1238 (1986). On March 13, 1986, the trial court

[3]Franklin had been convicted of the same offense twice before and sentenced to death after each conviction. The first conviction was reversed by the Texas Court of Criminal Appeals. *Franklin v. State*, 606 S.W.2d 818 (Tex.Crim.App. 1979). The trial court granted a new trial after Franklin's second conviction when it determined that the jury charge had been defective. *State of Texas v. Donald Gene Franklin*, Cause No. 310706.

scheduled Franklin's execution to be carried out before sunrise on April 16, 1986. Franklin filed a motion to withdraw the warrant of execution and an application for writ of habeas corpus in the trial court on April 3, 1986. The motion to withdraw the warrant of execution was denied on April 4, 1986, and the court recommended that the application for writ of habeas corpus be denied. The Court of Criminal Appeals denied a stay of execution and denied habeas corpus relief on April 8, 1986. *Ex parte Franklin*, Application No. 15,849-01.

On April 9, 1986, Franklin filed an application for stay of execution and a petition for writ of habeas corpus in the United States District Court for the Western District of Texas, San Antonio Division. *Franklin v. McCotter*, No. SA-86-CA-608. The court granted a stay of execution on April 10, 1986. The case was referred to a magistrate, who conducted an evidentiary hearing on April 30 and May 1, 1986. The magistrate filed a memorandum and recommendation recommending relief be denied. The district court issued a memorandum opinion on July 9, 1986, adopted the magistrate's findings and dismissed the petition. On July 15, 1986, the district court denied a certificate of probable cause to appeal.

The trial court scheduled a new execution date for September 16, 1986. Franklin applied to the Court of Appeals for the Fifth Circuit for a certificate of probable cause to appeal. The court granted the certificate on September 12, 1986, and also entered a stay of execution. On July 30, 1987, the court issued its opinion affirming the denial of habeas corpus relief and vacating the stay of execution. *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987). Franklin then filed a petition for writ of certiorari, which this Court granted. *Franklin v. Lynaugh*, ___ U.S.___, 108 S.Ct. 221 (1987).

B. Statement of Facts

The record reflects that Mary Margaret Moran disappeared at approximately midnight on the night of July 25, 1975, from the parking lot of the Veterans' Administration Hospital, where she worked as a nurse (R.VIII-2048). Her car was found partially backed out of its parking place, with the front door open and the engine turned off (R.VIII-2103, 2210). There was a pool of blood near the car and a trail of blood leading away from it (R.VIII-2105) After an extensive four-day search, involving not only the police but local civic groups, Boy Scout troops, and private citizens as well, Ms. Moran was found, alive, on July 30, 1975 (R.IX-2445-48; 2477-78). She was lying nude in a muddy ditch in a thickly weeded field near the hospital (R.IX-2548). Her clothing was strewn around the area near her body (R.X-2522). There were lacerations on her neck, a puncture wound to the right of her Adam's Apple, and seven stab wounds on her upper body. One of the stab wounds perforated her heart (R.X-2622). The wounds were infected and infested with insects (R.X-2618). Although she was still alive when found, she died several hours later in the hospital (R.VIII-2075; X-2628). Cause of death was listed as shock resulting from loss of blood due to multiple stab wounds, dehydration, and blood in the left chest cavity (R.X-2628).

A man identified as Franklin was seen in the hospital parking lot shortly before Ms. Moran disappeared (R.VIII-2129). A car driven by Franklin was observed speeding away from the area near Ms. Moran's car (R.VIII-2207). A security guard attempted to give chase but was unable to keep up with the car. He did notice and take down the car's license plate number. The car was traced to Franklin (R.IX-2263).

Within hours of Ms. Moran's disappearance, police arrived at Franklin's home and obtained his consent to

search the premises (R.IX-2276). Police discovered a pair of trousers soaking in a pail of bloody water (R.IX-2277; X-2593). In a trash can outside the house, they found a partially burned denim purse (R.IX-2300), identified as belonging to the victim (R.VIII-2062), as well as her checkbook, surgical scissors, and other personal effects (R.IX-2407). There were blood stains in the car, as well as a blood-stained rope (R.IX-2431). The blood matched the blood type of the victim (R.X-2597). Police also recovered a knife from the trash can (R.X-2407). Franklin was taken into custody at approximately 7:00 a.m. on July 26, 1975 (R.IX-2279).

Laboratory tests revealed that soil samples from shoes belonging to Franklin matched that in the area where Ms. Moran was found (R.X-2662). Hair found on a shirt belonging to Franklin matched the victim's (R.X-2678-79), as did hair found in Franklin's car (R.X 2683). Seed and plant samples taken from the trousers found soaking in Franklin's house matched samples at the scene were the victim was found (R.X-2689-90). Finally, it was determined that the cuts in Ms. Moran's clothing could have been caused by the knife found at Franklin's house (R.X-2687).

Franklin did not testify himself, but did call one witness who testified as to the care Ms. Moran received in the hospital, and one who testified that in his opinion, Ms. Moran should have been taken to a different hospital that was better equipped to handle emergencies (R.IX-2754-57). In his summation to the jury, Franklin's attorney argued that the identifications by the state's witnesses were unreliable (R.XII-2886, 2900), and that, even if Franklin committed the act, he did not have the requisite intent because medical records indicated that Ms. Moran received inadequate treatment in the hospital (R.XII-2895-99). The jury found Franklin guilty of capital murder as charged (T.I-13A).

The state's evidence at the punishment phase of the the trial consisted of testimony from four police officers that Franklin's reputation for being a peaceful and law-abiding citizen was bad (R.XIII-2925-35). In addition, Phyllis Green testified that Franklin had raped her approximately seven months prior to Ms. Moran's murder (R.XIII-2935). The state also introduced records showing Franklin's conviction and imprisonment for a previous rape (R.XIII-2946). Franklin introduced a stipulation that he had had no disciplinary problems while he had been in the Texas Department of Corrections from 1971-74, for the prior rape conviction, and from 1976-80, while he was in custody on the current charges (R.XIII-2952-53). The jury returned affirmative answers to the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon 1981), and Franklin was sentenced to death by the trial court (J.A. 18-20).

SUMMARY OF ARGUMENT

To be constitutional, a capital-sentencing statute must allow the defendant to introduce whatever relevant mitigating evidence he wishes the jury to consider. In addition, the jury must not be limited in its discretion to consider such evidence. Texas accomplishes this by submitting to the jury a set of special issues. The questions focus the jury's attention on the defendant's personal responsibility and moral guilt for the offense. The jury is authorized to return affirmative answers to the special issues only if it is persuaded beyond a reasonable doubt. To make this determination, the jury must necessarily consider all of the mitigating evidence before it. Requiring an additional instruction on how to consider mitigating evidence would be merely redundant and would not improve the reliability of the sentencing decision.

The Constitution does not entitle a defendant to rely on residual doubts about his guilt during the punishment phase of his trial. Therefore, even if the Texas statute does not allow for such an option, it is not constitutionally defective. However, the first special issue, concerning whether the defendant acted deliberately in committing the offense, does allow the defendant an opportunity to raise any residual doubt to the level of reasonable doubt, resulting in a negative answer to the question. Thus, the Texas statute does, in fact, allow for juror expression of residual doubt about the defendant's guilt.

Franklin's argument that the Texas scheme prevented his jury from giving independent mitigating weight to evidence of his good behavior in prison fails for two reasons. First, Texas does not restrict mitigating evidence to certain statutorily defined circumstances. Whatever evidence of his character or record or the circumstances of the offense the defendant chooses to offer is admissible and must be considered by the jury in making its punishment decisions. Second, the evidence of his good behavior was relevant only to the issue of whether he would be a future threat to society. Franklin concedes that the jury could understand the significance of the evidence to the second special issue. His attempt to ascribe any additional mitigating value to the evidence is futile.

ARGUMENT

I.

THE TEXAS CAPITAL-SENTENCING STATUTE AS APPLIED MEETS THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SENTENCING WITHOUT THE NECESSITY OF A SPECIAL INSTRUCTION ON MITIGATING EVIDENCE.

Franklin contends that Texas' capital sentencing procedure, found to be constitutional by this Court in *Jurek v. Texas*, 428 U.S. 262 (1976), no longer complies with Eighth Amendment jurisprudence as explicated in cases decided since *Jurek*. Specifically, he asserts that the special issues a jury must answer in deciding punishment in a capital case are so narrowly drawn that, absent a specific instruction on how to consider mitigating evidence, the jury can be prevented from considering relevant mitigating evidence and from engaging in the type of individualized sentencing mandated by the Constitution. Because the trial court in his case gave no such instruction, he argues that the jury could have excluded relevant mitigating evidence from its punishment deliberations so that his resulting death sentence was unconstitutionally imposed.

A. The Texas capital-sentencing statute was upheld in Jurek because it narrows the class of persons eligible for the death penalty and allows for jury consideration of mitigating evidence.

A capital-sentencing statute must meet two requirements to pass constitutional scrutiny. First, the

statute must be structured so that the death penalty is not imposed in an arbitrary and unpredictable fashion. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). It must provide "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). Second, a capital-sentencing statute must provide for individualized sentencing by allowing the defendant to present evidence in mitigation of a sentence of death. Mandatory capital punishment statutes have been struck down because of their "lack of focus on the circumstances of the particular offense and the character and propensities of the offender," *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 333 (1976); and sentences under guided-discretion statutes have been vacated when the sentencer was prevented from considering aspects of the defendant's character or record or the circumstances of the offense. *See Lockett v. Ohio*, 438 U.S. 586 (1978).

The Texas statute was found to satisfy both requirements in *Jurek v. Texas*, 428 U.S. 262 (1976). First, the offenses for which the state may seek to impose the death penalty are limited to intentional murders committed under strictly defined circumstances. Tex. Penal Code Ann. § 19.03 (Vernon Supp. 1988). Once a defendant is found guilty of capital murder, a separate sentencing hearing is conducted to determine whether the punishment will be life imprisonment or death. Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1987). Finally, all convictions that result in a sentence of death are automatically reviewed by the Texas Court of Criminal Appeals. Id., art. 37.071(f). The Texas statute was thus structured so as to prevent the sentencing authority from imposing a sentence of death in an arbitrary and unpredictable fashion. *Jurek*, 428 U.S. at 276. Franklin does not challenge the validity of this aspect of the statute.

This Court also found that the Texas procedure provides for individualized sentencing. In Texas, after finding a defendant guilty of capital murder, the jury is not directly asked whether the punishment should be life imprisonment or death. Rather, the following set of special issues is submitted:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Code Crim. Proc. Ann. art. 37.071(b). The jury must be persuaded beyond a reasonable doubt before a question may be answered affirmatively. If all of the issues submitted are answered "yes", the court sentences the defendant to death; otherwise, the sentence is life imprisonment.

In *Jurek* the Court noted that the special issues do not explicitly speak of mitigating circumstances. However, the Texas Court of Criminal Appeals had interpreted the second question so as to allow the defendant to present to the jury whatever mitigating evidence he might wish:

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look at the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."

Jurek, 428 U.S. at 272, quoting *Jurek v. State*, 522 S.W.2d 934, 939-40 (Tex.Crim.App. 1975). The Texas statute puts before the jury "all possible relevant information about the individual defendant whose fate it must decide." *Jurek*, 428 U.S. at 276. In thus providing for individualized sentencing, Texas' procedure meets the requirements imposed by the Constitution.

Further, the Court recognized that no special instruction is necessary to guide a Texas jury in carrying out its sentencing function. Providing the jury with whatever mitigating evidence the defendant could show "ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.* at 276. And in a concurrence, Justice White, joined by Chief Justice Burger and Justice Rehnquist, agreed "that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them." *Id.* at 279.

B. The continued viability of the Texas capital-sentencing statute is not subject to doubt.

1. Jurors do not require special instructions to understand the significance of mitigating evidence with regard to the special punishment issues.

Franklin argues that the structure of the special issues might convince jurors that they are unable to consider certain evidence. He relies on the opinion expressed by three dissenting members of the Texas Court of Criminal Appeals. In *Stewart v. State*, 686 S.W.2d 118, 125-26 (Tex.Crim.App. 1984) *cert. denied*, 474 U.S. 866 (1985), Judge Clinton, joined by Judges Teague and Miller, noted that evidence of mental illness and childhood deprivation could be introduced by the defendant as mitigating circumstances, but could also be viewed as weighing in favor of a death sentence. The dissent opined that the jury ought to be instructed by the trial court that the evidence had to be considered as mitigating. *See also Johnson v. State*, 691 S.W.2d 619, 627 (Tex.Crim.App. 1984), *cert. denied*, 474 U.S. 865 (1985) (Clinton, J., dissenting).

The minority members of the Court of Criminal Appeals themselves recognized, however, what this Court stated in *Eddings v. Oklahoma*, 455 U.S. 104 (1982): that evidence of difficult family history and of emotional disturbance is frequently introduced by defendants in mitigation, and juries can easily grasp its significance. *Eddings*, 455 U.S. at 115. Although the sentencing authority cannot refuse to or be precluded from considering certain evidence as mitigating, nothing in the Constitution requires that it be considered *only* as mitigating. This much is evident from the Court's

recognition in *Enmund v. Florida*, 458 U.S. 782 (1982), that, while a vicarious felony murderer may be executed in some states absent an intent to kill if sufficient aggravating factors are present, some of those same states make it a *mitigating* factor that the defendant was an accomplice to the murder and his own participation was relatively minor. *Enmund*, 458 U.S. at 791-92. It also follows from the requirement that the defendant be allowed to explain any evidence the state introduces in favor of the death sentence. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Like any circumstantial evidence, that introduced at the punishment phase of a capital murder trial can be susceptible of more than one interpretation. It is for the jury to determine the weight such evidence receives. *See Eddings*, 455 U.S. at 114-15 ("[t]he sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence"); *Barclay v. Florida*, 463 U.S. 939, 961 n. 2 (1983) (Stevens, J., concurring) (neither *Lockett* nor *Eddings* held that any particular weight must be given by the sentencer to mitigating evidence); *Zant v. Stevens*, 462 U.S. 862, 891 (1983) (Constitution does not require states to adopt specific standards for instructing jury how to consider aggravating and mitigating circumstances).

The Constitution requires the sentencer to listen to the defendant's mitigating evidence but does not usurp the sentencer's role in assessing the value of that evidence. Similarly, the Texas statute allows the defendant to submit to the jury whatever mitigating evidence he chooses to and requires the jury to consider that evidence in deciding punishment, but leaves to the jury the determination of what weight to give to it. *See Cordova v. State*, 733 S.W.2d 175, 189 (Tex.Crim.App. 1987) (in Texas, mitigating evidence is given effect by the influence it has on the jury during deliberations).

Other than evidence of mental or emotional disturbance, Franklin points to nothing that a defendant might offer in mitigation that the jury would not be able to consider in answering the special punishment issues. Instead, he speculates in general terms that "some" evidence "might" not appear relevant and thus not enter into the jury's deliberations. However, the special issues are in fact precisely drawn so that they focus the jury's attention on the defendant's personal responsibility and moral guilt. *See Tison v. Arizona*, ___U.S.___,___, 107 S.Ct. 1676, 1683 (1987); *Enmund v. Florida*, 458 U.S. at 801. Thus, the jury must consider any relevant mitigating evidence, *i.e.*, anything concerning the circumstances of the offense and the character or record of the defendant, in determining the answers to the issues.

The first special issue in Texas asks whether the defendant acted deliberately and with the reasonable expectation that the death of the victim or another would result. Contrary to Franklin's assertion, the answer to this question is not pre-ordained by the jury's finding that the defendant acted intentionally in committing the murder. The Court of Criminal Appeals has noted that "intentionally" and "deliberately" have different meanings in normal usage that a jury can appreciate. *Fearance v. State*, 620 S.W.2d 577, 584 (Tex.Crim.App.), cert. denied, 454 U.S. 899 (1981); *Heckert v. State*, 612 S.W.2d 549, 552 (Tex.Crim.App. 1981). The first special issue addresses the defendant's mental state not as it relates to his criminal culpability but as it concerns his moral guilt. Evidence that the murder was reflexive rather than reflective would clearly be relevant to the issue, as would evidence showing that a defendant convicted of capital murder under the law of parties did not personally kill, attempt to kill, or intend that lethal force be used. *Green v. State*, 682 S.W.2d 271, 287 (Tex. Crim. App. 1984), *cert. denied*,470 U.S. 1034 (1985); *Means v. State*, 668 S.W.2d 366, 375 (Tex. Crim. App. 1983), *cert. denied*, 466 U.S. 945

(1984). The fact that in a given case a defendant might not have such evidence to present does not serve to invalidate the issue.

The third issue, too, is directed at the defendant's moral guilt and is relevant in cases where self-defense is pled.[4] Even though the jury might determine that the circumstances of the offense or of the defendant's character do not excuse his criminal guilt, such evidence could clearly be persuasive that his moral guilt is not such that he deserves the death penalty. *Cf. Smith v. State,* 676 S.W.2d 379, 393 (Tex. Crim. App. 1984), *cert. denied,* 471 U.S. 1061 (1985).

Similarly, the second special issue allows the defendant to present evidence of his character or record that tends to show that he is a good prospect for rehabilitation. Franklin identifies no specific evidence that a defendant might offer in regard to this special issue that is not obviously relevant to his future dangerousness, or that the jury is precluded from considering. He argues that the Court of Criminal Appeals has prevented adequate consideration of mitigating evidence by holding that the facts of the offense alone can be sufficient to support an affirmative finding to the special issue. *E.g., Green v. State,* 682 S.W.2d at 289. That is incorrect. The court's holding in *Green* does not preclude consideration of mitigating evidence. It simply recognizes that the facts of an offense can be relevant to whether a person will commit similar acts in the future and that, in a proper case, can outweigh the factors advanced in mitigation.

[4]Franklin's dismissal of the third special issue because it is only submitted in cases where raised by the evidence seems to imply that all mitigating factors must be relevant in every case. This clearly is not the case. Just as not every defendant will be able to point to a troubled upbringing or a history of mental or emotional disturbance, so, too, not every defendant will be able to claim that he killed in response to the victim's provocation.

Put another way, the court has merely implemented this Court's expressions in *Eddings* and *Stevens* that it is up to the sentencing authority to determine what weight to give mitigating evidence.[5]

Franklin further argues that the Texas capital-sentencing statute, as interpreted by the courts, merely *allows* the jury to take mitigating evidence into account, whereas *Lockett* and its progeny mandate that the jury "listen" to the evidence. Franklin's argument is purely speculative, and is directly contradicted by the manner in which the Texas statute actually operates. First, the special issues are carefully drawn so that the jury's attention is focused on those factors relevant to determining punishment in a capital case. Then the jury is instructed that it is to consider all of the evidence introduced at both phases of the trial in answering the special issues. Finally, the court instructs that jurors must be convinced beyond a reasonable doubt before the issues can be answered affirmatively. Unlike the situations in *Eddings* and *Hitchcock* v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987), where there were clear expressions that relevant evidence was not considered by the sentencing authority,

[5]Franklin also contends that the Texas statute is more restrictive than the one this Court found deficient in *Hitchcock v. Dugger,* ___U.S. ___, 107 S.Ct. 1821 (1987). In fact, the opposite is true. The Florida statute expressly limited the jury's consideration to certain enumerated mitigating factors. The Texas statute has no statutorily defined mitigating circumstances and anything about the facts of the offense or about his character or record that the defendant feels will redound in his favor is admissible and must be considered by the jury. This also disposes of his claim that the Texas statute, as applied, is indistinguishible from the Ohio statute at issue in *Lockett*. The only similarity between the statutes is that the Ohio statute restricted jury consideration to three mitigating circumstances, while Texas' statute asks the jury to answer three special issues. In answering the special issues, however, the Texas jury must consider all relevant mitigating evidence. *Pre-Lockett* Ohio juries had no such discretion.

Franklin points to nothing that suggests that Texas jurors do not follow their oaths and instructions.

Not only have subsequent decisions not raised questions about the Texas scheme, but the Court has repeatedly cited the Texas statute with approval as permitting jury consideration of relevant mitigating circumstances even though the special issues do not refer explicitly to mitigating factors. *See Lowenfield v. Phelps*, ___ U.S. ___, ___, No. 86-6867, slip op. at 13 (January 13, 1988); *Sumner v. Shuman*, ___ U.S. ___,___, 107 S.Ct. 2716, 2720 (1987); *Pulley v. Harris*, 465 U.S. 37, 48-50 & nn. 9, 10 (1984); *Zant v. Stevens*, 462 U.S. at 875 n. 13 (1983); *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983); *Lockett v. Ohio*, 438 U.S. at 606-07. And in *Lockhart v. McCree*, ___ U.S. ___, ___, 106 S.Ct. 1758, 1769-70 (1986), the Court expressly recognized that the special punishment issues allow Texas juries sufficient discretion to consider all relevant mitigating evidence:

> Although purporting to limit the jury's role to answering several "factual" questions, in reality [the Texas capital sentencing scheme] vest[s] the jury with considerable discretion over the punishment to be imposed on the defendant. See [*Adams v. Texas,*] 448 U.S., at 46 ("This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths"); cf. *Jurek v. Texas*, 428 U.S. 262, 273 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) ("Texas law essentially requires that...in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it").

While, on the one hand, the Texas special issues allow the jury sufficient discretion, they are not so vague that the jury's discretion is unguided and standardless:

> [T]he issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them. The statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions.

Jurek, 428 U.S. at 279 (White, concurring); *accord, Lowenfield v. Phelps*, ___ U.S. at ___, slip op. at 13.

In *California v. Ramos*, 463 U.S. 992 (1983), the Court considered the defendant's contention that, inasmuch as the sentencing jury at his capital trial had been instructed as to the governor's power to commute a life sentence, "basic principles of fairness" required that it also be instructed on the governor's power to commute a death sentence. The Court rejected this argument, reasoning as follows:

> Although such an instruction would be "neutral" in the sense of giving the jury complete and factually accurate information about the commutation power, it would not "balance" the impact of the Briggs Instruction, even assuming, *arguendo*, that the current instruction has any impermissible skewing effect. Disclosure of the complete nature of the commutation power would not eliminate any skewing in favor of death or

increase the reliability of the sentencing choice.

Id. at 1011.

The same is true in Franklin's case. As discussed above, the Court has consistently reaffirmed its holding in *Jurek* that there is no constitutional infirmity in the Texas statute as interpreted by the Court of Criminal Appeals. There is no "skewing" toward death as there would be, for example, if the jury were instructed on aggravating factors without requiring a parallel instruction on mitigating evidence. There is, in short, no defect in the statute as applied which might be cured by Franklin's proposed instructions. *A fortiori*, such an instruction is not mandated by the Constitution.

2. No decision of this Court since *Jurek* has changed the standards for jury consideration of mitigating evidence.

Since deciding *Jurek* in 1976 this Court has readdressed the issue of capital-sentencing procedures on several occasions. It has held that in crafting their statutes, the states may decide what factors are relevant to the sentencing decision and that the courts will ordinarily defer to these legislative determinations. *Booth v. Maryland*, ___U.S. ___, ___, 107 S.Ct. 2529, 2532 (1987). However, the standards the states employ to guide the sentencer's decision-making cannot be excessively vague. *California v. Ramos*, 463 U.S. at 1000-01 & n. 12 (1983); *Godfrey v. Georgia*, 446 U.S. 429 (1980). In addition, individualized sentencing requires that the state's evidence in favor of a death sentence must have some bearing on the defendant's personal responsibility and moral guilt, *Tison v. Arizona*, ___ U.S. at ___, 107 S.Ct. at 1683; *Enmund v. Florida*, 458 U.S.

782, 801 (1982), and the defendant must have the opportunity to explain or deny such evidence. *Ramos*, 463 U.S. at 1001; *Gardner v. Florida*, 430 U.S. 349 (1977).

However, Franklin contends that the Court has broadened its interpretation of individualized sentencing and that, without a specific instruction, Texas jurors might not appreciate the relevance of mitigating evidence to the special issues. To the contrary, an examination of the cases on which he relies demonstrates that the Court has reiterated that the state cannot limit a defendant's ability to introduce, and the sentencer's discretion to consider as a mitigating factor, any evidence relevant to "any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *California v. Brown*, ___ U.S. ___, ___, 107 S.Ct. 837, 839 (1987); *Lockett v. Ohio*, 438 U.S. at 604; *Jurek v. Texas*, 428 U.S. at 274. The application of these principles to specific situations has worked no substantive change in the requirement of individualized sentencing.

The Court first reviewed the individualized sentencing requirement in *Lockett v. Ohio*, 438 U.S. 586 (1978). The Ohio capital-sentencing statute defined only three mitigating circumstances that would allow for a sentence less than death. The sentencing authority could consider various non-statutory mitigating factors but only to help determine whether one of the statutorily defined circumstances was present. This scheme prevented the sentencer from giving independent mitigating weight to evidence of the defendant's character or record or to the circumstances of the offense, but that was not encompassed within one of the defined mitigating factors. Because this violated the requirement of individualized sentencing, the death sentence was reversed.

The issue next arose in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Eddings was sixteen years old when he murdered an Oklahoma highway patrolman. At trial he introduced considerable evidence of his unhappy upbringing and emotional disturbance. Nonetheless, the trial judge stated that he was prevented "as a matter of law" from considering that evidence in reaching his decision whether to impose the death penalty. *Id.* at 109. In addition, the Oklahoma Court of Criminal Appeals dismissed the evidence as irrelevant because it did not provide a legal excuse from criminal responsibility. *Id.* at 113. This Court determined that the evidence was relevant to Eddings' character and therefore was proper mitigating evidence. Just as the individualized sentencing doctrine prevented the state from withholding such evidence from the sentencer's view, it also mandated that the sentencing authority not refuse to consider the evidence. Eddings' death sentence was reversed because the sentencer did not give the necessary consideration to mitigating evidence.

Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669 (1986), involved a specific application of *Lockett*. There, the defendant attempted to introduce evidence of his good behavior while in custody awaiting trial as a mitigating factor showing that he would not be a threat to society. The trial court excluded the evidence as irrelevant to any issue in the case. This Court concluded that the evidence did bear on the defendant's ability to adapt to prison life and, as such, might serve as a basis for a sentence less than death. *Id.* at ___, 106 S.Ct. at 1671. As in *Lockett*, the state had failed to allow for individualized sentencing by precluding the sentencer from considering relevant mitigating evidence.

The Court most recently discussed the individualized sentencing doctrine in *Hitchcock v. Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987). There, the defendant had

introduced evidence of his troubled upbringing and his potential for rehabilitation, but the trial court's instructions to the jury expressly referred only to the statutorily defined mitigating circumstances, which did not include these factors. *Id.* at ___, 107 S.Ct. at 1824. After receiving the advisory jury's recommendation of death, the trial court noted that the statutory mitigating factors present in the case did not outweigh the statutory aggravating factors. Consequently, he sentenced the defendant to death. As in *Eddings*, the evidence proffered by Hitchcock was relevant mitigating evidence as that term had been previously defined, and its exclusion from the sentencer's consideration resulted in the death sentence being unconstitutionally imposed.

None of these decisions represent either a departure from or an extension of the principles informing *Jurek*. In each instance, the Court reiterated the rules applied in *Jurek*: that the state cannot preclude a capital defendant from presenting to the jury relevant mitigating evidence, *i.e.*, evidence concerning the circumstances of the offense or his character and record, and cannot limit the sentencing authority's discretion by preventing it from considering such evidence.

3. No decision by the Texas Court of Criminal Appeals has changed the standards for jury consideration of mitigating evidence.

Franklin contends that by refusing to require additional instructions, the Texas Court of Criminal Appeals has narrowed the scope of the state's capital-sentencing statute. On the contrary, the Texas court has remained firm in its interpretation of the statute upon which this Court relied in *Jurek*. It has reiterated that all relevant mitigating evidence is admissible during the

punishment phase of a capital murder trial. *Anderson v. State*, 701 S.W.2d 868, 873-74 (Tex.Crim.App. 1985), *cert. denied*, ___U.S. ___, 107 S.Ct. 239 (1986); *Johnson v. State*, 691 S.W.2d 619, 624 (Tex.Crim.App. 1984), *cert. denied*, 474 U.S. 865 (1985) ("*Lockett* indicated clearly that prior record and aspects of the character of the defendant are the type of mitigating factors that should be permitted. Art. 37.071 and case law that has developed under Art. 37.071 demonstrate that exactly those types of mitigating circumstances are admissible."); *Stewart v. State*, 686 S.W.2d 118, 121 (Tex.Crim.App. 1984), *cert. denied*, 474 U.S. 866 (1985); *Quinones v. State*, 592 S.W.2d 933, 947 (Tex.Crim.App. 1980)[6]. In addition, the Texas court has construed the first special issue to also permit consideration of relevant mitigating circumstances:

> The first of the three issues under Art. 37.071(b) must allow consideration of mitigating factors as to whether the act was committed *deliberately*. If the jury does not unanimously answer "yes", the only authorized punishment is confinement for life. . . We do not find that subsequent construction by cases following *Jurek v. Texas*, supra, have limited the deliberateness issue so that proper consideration of mitigating circumstances is excluded.

[6]Not only has the Texas court affirmed death sentences on the basis that the special issues allow for admission of whatever relevant mitigating evidence the defendant has to offer, it has also reversed when the trial court failed to comply with the requirements of *Lockett*, *Eddings*, and *Skipper*. See *Cass v. State*, 676 S.W.2d 589 (Tex.Crim.App. 1984) (death sentence reversed because the trial court excluded testimony of five lay witnesses who "had known the defendant all his life" and who would have testified that he was unlikely to commit violent acts in the future.)

Williams v. State, 674 S.W.2d 315, 321-22 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 1110 (1985) (emphasis in original).

Franklin criticizes the Court of Criminal Appeals' refusal in *Adams v. State*, 577 S.W.2d 717, 729 (Tex. Crim. App. 1979), to give a requested instruction that the jury could extend leniency, even if it answered the special issues affirmatively. He relies on the language in *McCleskey v. Kemp*, ___ U.S. ___, ___, 107 S.Ct. 1756, 1773 (1987), that the Constitution limits the "State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence" (emphasis in original). He appears to argue from this that the juries must have the option of granting mercy to a particular defendant, even if it determines that death is warranted under the law. This Court has never held that the states must provide for leniency in their capital-sentencing statutes. In *Jurek*, the Court expressly recognized that death is the mandatory punishment in Texas if all of the special issues are answered affirmatively. *Jurek*, 428 U.S. at 278 (White, J., concurring). *Jurek* also used language almost identical to that in *McCleskey* to describe the standard to be employed at sentencing: "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek*, 428 U.S. at 271. *See also Lowenfield v. Phelps*, ___ U.S. at ___, slip op. at 13.

Now, twelve years after *Jurek*, the Texas capital-sentencing statute continues to satisfy the requirements of individualized sentencing mandated by the Eighth Amendment. None of this Court's post-*Jurek* decisions impose any new constitutional burden on the state or cast any doubt on the constitutionality of the Texas statute. Now, just as in 1976, the special issues on punishment focus the jury's attention on the defendant's personal

responsibility and moral guilt for the offense and allow the defendant to present any evidence he wishes concerning the circumstances of the crime and his own character and record. The jury is instructed that the state bears the burden of proving beyond a reasonable doubt that the special issues should be answered affirmatively and that it is to consider all of the evidence in arriving at its decision. The special issues are structured in such a way that the jury cannot answer them without taking into account all mitigating evidence offered by the defense. As submitted to the jury, the special issues possess a "common-sense core of meaning" and "juries can readily grasp the logical relevance of mitigating evidence" to the issues. *Cordova v. State*, 733 S.W.2d at 190. Because the statute thus allows for individualized sentencing, the reliability of the sentencing process would not be enhanced by an instruction regarding the jury's consideration of mitigating evidence.

II.

THE JURY IN FRANKLIN'S CASE ENGAGED IN THE INDIVIDUALIZED SENTENCING REQUIRED BY THE CONSTITUTION IN ASSESSING THE DEATH PENALTY.

Franklin contends that his case illustrates the alleged deficiencies of the Texas capital-sentencing statute. He asserts that because of the structure of the special issues and the nature of the mitigating evidence he offered, the jury might have believed it was precluded from considering his evidence, might have excluded the evidence from its deliberations, and might have failed to give the evidence independent mitigating weight. On the contrary, his case demonstrates just how the Texas statute operates in conformity with the the requirements of the Eighth Amendment.

A. A defendant is not constitutionally entitled to rely on "residual doubt" as to his guilt at the punishment phase of the trial.

Franklin points out that the state's case against him consisted of circumstantial evidence. He argues that although the evidence had convinced the jury beyond a reasonable doubt that he was guilty, there nonetheless might have been some jurors who harbored sufficient "residual doubts" that they might have felt that a sentence less than death was appropriate, and he claims that the special issues precluded the jurors from giving expression to these doubts. Therefore, he concludes, his death sentence was imposed in violation of the Eighth Amendment.

As discussed in Part I B 1, *supra*, the Constitution requires that the state not limit the defendant's presentation or the sentencer's consideration of relevant mitigating evidence. *California v. Brown*, ___ U.S. at ___, 107 S.Ct. at 839. In this context, however, "relevant mitigating evidence" has a precise meaning. It has been restricted to the circumstances of the offense and the character or record of the defendant. *Hitchcock v. Dugger*, ___ U.S. at ___, 106 S.Ct. at 1669; *Woodson v. North Carolina*, 428 U.S. at 304. This Court has steadfastly refused to include "residual doubts" about the defendant's guilt within the sweep of relevant mitigating evidence. *Lockhart v. McCree*, ___ U.S. at ___, 106 S.Ct. at 1769 (some states "do not allow the defendant to argue 'residual doubts' to the jury at sentencing."); *Id.* at 1781 (Marshall, J., dissenting) (noting that "this Court has consistently refused to grant certiorari in state cases holding that these doubts cannot properly be considered during capital sentencing proceedings.") Simply put, a defendant is not constitutionally entitled to rely on such

doubts as a mitigating factor.[7] Even if the Texas capital-sentencing statute does not allow the jury to consider residual doubts about the defendant's guilt in deliberating on the punishment issues, that does not render the statute, or death sentences obtained under it, invalid.

In fact, however, special issue one does allow for jury expression of any residual doubts about the defendant's guilt. Because the jury is required to find that the defendant acted not only intentionally but also deliberately, counsel has the opportunity during the punishment phase of the trial to raise any residual doubt as to guilt to the level of reasonable doubt.[8] Any juror so persuaded then would be able to answer the first issue negatively.[9]

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[7]The state bears the burden at punishment of proving beyond a reasonable doubt that the special issues should be answered affirmatively. To the extent that Franklin is arguing that the state must prove its case beyond *all* doubt, he is seeking to impose an unwarranted burden on the state.

[8]Counsel did not so attempt in Franklin's case.

[9]Franklin cannot argue that the term "intentional," an element of the offense of capital murder, and the term "deliberate," as used in the first special issue, are linguistic equivalents, thereby not allowing a jury to express residual doubt. The Texas Court of Criminal Appeals has consistently held that the two terms are not synonymous and that the term "deliberate" means "the thought process which emphases more than a will to engage in conduct and activates the intentional conduct." *Thompson v. State*, 691 S.W.2d 627 (Tex. Crim. App. 1984), *cert. denied*, ___ U.S. ___ 106 S.Ct. 184 (1985); *Fearance v. State*, 620 S.W.2d at 584. Moreover, Texas juries are, in fact, clearly able to distinguish between the two terms. *See Heckert v. State*, 612 S.W.2d 549 (Tex. Crim. App. 1981) (after finding defendant guilty of capital murder, jury answered first special issue negatively).

B. The second special issue allowed full jury consideration of the mitigating effects of Franklin's prior prison record.

During the punishment phase of his trial, Franklin introduced a stipulation that he had had no disciplinary problems while he was incarcerated for a prior rape (R.XIII-2952-53). During jury argument Franklin's attorney contended that this demonstrated that Franklin could adjust to prison life and that he would not be a danger to society if he were sentenced to life imprisonment (R.XIII-2963-65). He argued that the evidence warranted a negative answer to the second special issue: whether there was a probability that Franklin would commit acts of criminal violence that would constitute a continuing threat to society (R.XIII-2965).

Franklin acknowledges that the jury was able to understand the significance of the evidence with respect to the second issue even without an additional instruction. He contends, however, that this was evidence of his character relevant to the sentencing determination independent of whether he would be a future danger, and that the jury should have been permitted to give it independent mitigating weight. *See Lockett v. Ohio*, 438 U.S. at 605. On this basis, he asserts that because of the structure of the Texas special issues and the lack of specific instructions, the jury might not have considered this evidence as mitigating.

The Ohio statute at issue in *Lockett* required that the death penalty be assessed in particular cases unless the defendant established at least one of three statutory mitigating factors. Non-statutory mitigating factors could be given no effect in the sentencing decision except insofar as they shed some light on the circumstances delineated

in the statute. This Court held that a sentence of death imposed under this statute violated the Eighth Amendment because it did not allow the sentencer to consider, as mitigating factors, all aspects of a defendant's character or record or the circumstances of the offense proffered by the defendant. *Lockett*, 438 U.S. at 604, 608.

Lockett is distinguishable from Franklin's case in two respects. First, unlike Ohio, Texas does not limit mitigating circumstances to those defined by statute. Any evidence relating to the defendant's character or record or to the circumstances of the offense that the defendant wants to submit is admissible and is relevant to at least one of the special issues. The jury must consider the evidence when it makes its punishment decisions. Thus, the limitations imposed on the sentencer in Ohio in taking mitigating evidence into account do not exist in the Texas scheme.

Second, Franklin's assertion that evidence of his adaptability to prison life is relevant to the sentencing decision apart from what it might say about his future dangerousness is simply wrong. In *Skipper v. South Carolina*, ___ U.S. at ___, 106 S.Ct. at 1671, the Court considered whether testimony regarding a defendant's good behavior in jail constituted relevant mitigating evidence that the defendant must be allowed to put before the sentencing authority. Noting that a defendant's past conduct can be indicative of his probable future behavior, the Court held that the evidence "must be considered potentially mitigating." *Id.* at ___, 106 S.Ct. at 1671. It is obvious from the Court's discussion of the evidence that its relevance is to the issue whether the defendant will pose a future threat. *Id.*

Logic confirms that this is the appropriate consideration. The ability to adapt to prison conditions and to avoid disciplinary problems might form the basis

for a sentence less than death precisely because it indicates that the defendant might not be a danger to others. *See Skipper*, ___ U.S. at ___, 106 S.Ct. at 1672. That such evidence might also suggest valuable character traits, such as self-discipline, respecting the rights and interests of others, and the ability to work out disputes rationally and peacefully (Brief for Petitioner at 17) is simply another way of saying that it was evidence that the defendant would not be violent in prison and would not pose a danger to others. Franklin's attempt to ascribe mitigating value to the evidence apart from this is unavailing.

Further, there is simply nothing in the Texas sentencing scheme which prevented Franklin from so arguing to the jury. Defense counsel was free to characterize the evidence as he saw fit at his closing argument, and the jury would not have been precluded from accepting any such characterization if it so chose. It would then have been within the jury's carefully guided discretion to determine if, and to what extent, the evidence bore on the special issues it was required to answer.

Thus, the Texas capital-sentencing statute allows the defendant to present whatever mitigating evidence he wants to put before the jury. The special issues focus the jury's attention on the relevant sentencing considerations. In determining whether the state has proven beyond a reasonable doubt that the special issues should be answered affirmatively, the jury necessarily must consider all relevant mitigating evidence. Requiring an additional specific instruction on mitigating evidence would not provide for greater reliability in the process of deciding the defendant's sentence.

CONCLUSION

For the above reasons, the state requests that the judgment of the court below be affirmed.

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No. 87-5546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner

v.

JAMES A. LYNAUGH, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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A. A Rational Juror Could Have Entertained A Residual Doubt About Guilt Despite Finding That Mr. Franklin Acted Deliberately

As Mr. Franklin demonstrated in his original brief, the sentencing jury in his case was precluded from considering residual doubt about his guilt as a mitigating circumstance. Texas contends that "a defendant is not constitutionally entitled to rely on such [residual] doubts as a mitigating factor." Respondent's Brief pp. 27-28. This is clearly wrong. In fact, this Court has held that the sentencer may not be precluded from considering "as a mitigating factor, any aspect of a defendant's character or record and *any of the circumstances of the offense* that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (emphasis supplied). It is difficult to imagine a more relevant mitigating "circumstance of the offense" than a doubt about whether the defendant committed the offense.

The state also argues that, even if residual doubt can be a relevant mitigating circumstance, it was adequately considered by the sentencing jury in answering special issue number one, which asks whether defendant acted deliberately. The record belies this assertion.

The first special issue's focus on the mental state of deliberation had nothing whatsoever to do with the principal residual doubt argued by Mr. Franklin's attorney, which was concerned with whether he had been mistakenly identified as the perpetrator of the offense. The question submitted at the punishment phase reads as follows:

> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Donald Gene Franklin, *that caused the death of Mary Mar-*

garet Moran, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

[T.I.—54]; JA 15 (emphasis supplied). As is clear from the question, the sentencing jury was not concerned in any degree with *whether* Mr. Franklin was the perpetrator of the instant offense; indeed, it was instructed that his conduct had "caused the death." Given the manner in which the question was put to the jury, it cannot fairly be said that it left any room whatsoever to argue doubt—residual, reasonable, or otherwise—that Mr. Franklin had been mistakenly identified.

B. A Rational Juror Could Have Affirmatively Answered Special Issue Number Two Without Giving Independent Mitigating Weight To Evidence That Mr. Franklin Had Not Been A Disciplinary Problem In Prison

Texas concedes, as it must, that evidence of Mr. Franklin's exemplary behavior while imprisoned for seven years in the Texas Department of Corrections is a relevant mitigating circumstance. Respondent's Brief, p. 30. It further argues, however, that this evidence has no independent mitigating weight apart from its relevance to his probable future conduct, which is clearly comprehended by special issue number two. *Id.* at 31. Such an interpretation is inconsistent with this Court's holdings in *Skipper* v. *South Carolina*, 106 S.Ct. 1669 (1986), and *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

In *Skipper*, the Court specifically noted that the jury "could have drawn favorable inferences from [testimony that petitioner had made a good adjustment to prison life] regarding petitioner's character *and* his probable future conduct if sentenced to life in prison." *Skipper*, 106 S.Ct. at 1671 (emphasis supplied). Thus, the Court has recognized that evidence such as that proved by Mr. Franklin

here might be mitigating *both* as to character *and* as to probable future conduct. And, that *either* of "such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" *Id.*

The language is consistent with *Lockett* v. *Ohio*, which struck down a state statute which did not permit "*individualized* consideration of mitigating factors" as required by the Constitution. *Lockett*, 438 U.S. at 606 (emphasis supplied). It is for the jury to give individualized consideration to all relevant mitigating factors, and to give those factors the appropriate "independent mitigating weight." *Id.* at 605.

In *Bell* v. *Ohio*, 438 U.S. 637 (1978), the Court applied *Lockett* to invalidate the death sentence of a mentally deficient youngster who contended that the "the Ohio death penalty statute . . . severely limited the factors that would support an argument for mercy. Bell contended that his youth, the fact that he had cooperated with the police, and the lack of proof that he had participated in the actual killing strongly supported an argument for a penalty less than death in this case. He also contended that Ohio's . . . death penalty statute precluded him from requesting a lesser sentence on the basis of those factors." 438 U.S. at 641. In light of Bell's testimony that "he had viewed this co-defendant Hall as a 'big brother' and had followed Hall's instructions because he had been 'scared,'" *Id.* at 641, it is plain that virtually all of the mitigating evidence which Bell contended could not be urged upon his sentencers as the basis for a sentence less than death was in fact relevant to the second mitigating circumstance enumerated in the Ohio statute: "It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation." *Lockett* v. *Ohio*, 438 U.S. at 612. The reason

the Court sustained Bell's claim was not that the evidence to which he and the Chief Justice's opinion pointed could not have been considered at all within the framework of Ohio's statute, but rather that this evidence could not receive "independent mitigating weight" (*Lockett*, 438 U.S. at 605) and that the statute therefore precluded" 'the type of individualized consideration of mitigating factors' . . . required by the Eighth and Fourteenth Amendments." *Bell* v. *Ohio*, 438 U.S. at 642.

Bell thus conclusively rejects Texas' contention that the sentencing procedure employed here was constitutional simply because the mitigating evidence proved was relevant to an enumerated statutory question. Certainly, evidence of good prison behavior was relevant to future dangerousness. But it also had a mitigating potential independently of future dangerousness. Because the instruction given here was framed solely in terms of future dangerousness, however, Mr. Franklin's jury was precluded from giving the "individualized consideration" to this mitigating factor which is required by the Constitution.

CONCLUSION

For these various reasons, the decision below should be reversed.

Respectfully submitted,

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